

MICROSOFT RESPONSE

EC CONSULTATION ON EU MERGER CONTROL PROCEDURAL AND JURISDICTIONAL ASPECTS

JURISDICTIONAL THRESHOLDS

In October 2016, the European Commission (“Commission”) launched a public consultation on various procedural and jurisdictional aspects of EU merger control, including the jurisdictional thresholds in the EU Merger Regulation (“EUMR”).

According to the consultation material, the Commission is considering the effectiveness of the current turnover-based thresholds and whether “*they allow to capture all transactions which can potentially have an impact in the internal market*”.¹ The Commission asks this question regarding acquisitions of *inter alia* digital economy players that do not generate substantial revenues but (i) collect troves of valuable data; (ii) have built up a significant user base; or (iii) develop new and potentially disruptive technologies. The Commission considers complementing the existing turnover-based thresholds with additional notification requirements, *e.g.*, based on transaction value.

Microsoft submits that it is neither necessary nor appropriate to introduce additional jurisdictional thresholds. *First*, there is no enforcement gap in EU merger control in the digital economy. There is no empirical evidence of cases in this sector which were not reviewed by the Commission or the national competition authorities (“NCAs”) and led to reductions in consumer welfare in the EEA. Moreover, industry trends suggest that going forward, high-value tech deals involving companies with no or limited revenues will be a rare occurrence (Section I). *Second*, additional jurisdictional thresholds could undermine the fundamental characteristics of the overall merger control system in Europe. The legal certainty that turnover-based thresholds bring and the definition of “concentration” could be at risk. New thresholds would unsettle the clear boundaries that exist today between the competences of the Commission and the NCAs (Section II). *Third*, even if an enforcement gap existed, it would not be captured effectively by the additional thresholds. Transaction value is notoriously subjective and it can change materially over short periods. Moreover, it is unsuitable for determining the nexus of a deal with the EU. Geographic allocation of transaction value is subjective and complex (Section III).

I. No Need for Additional Thresholds Regarding Digital Economy Transactions

1. No Evidence of Enforcement Gap in *Facebook/WhatsApp*

The consultation does not provide empirical evidence of a jurisdictional gap. Indeed, no examples are provided of digital economy cases which were not reviewed by the Commission or the NCAs and which likely affected competition in the internal market. Reference is made only to *Facebook/WhatsApp*.² Although WhatsApp had 600 million monthly active users (“MAU”), its turnover was (and still is) minimal and did not trigger EU jurisdiction. The deal did however trigger filings in three Member States and the parties decided to refer the case to the Commission under Article 4(5) EUMR. The Commission cleared

¹ See Questionnaire for public consultation, p. 20, Consultation’s evaluation roadmap, p. 2, and Consultation strategy paper, pp. 1-2, all available at http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.

² Commission decision of 3 October 2014, Case M.7217, *Facebook/WhatsApp*.

Facebook/WhatsApp unconditionally. Indeed, this case confirms that there is no gap that would justify additional jurisdictional thresholds. The existing system of jurisdiction allocation between NCAs and the Commission works well. Even if the parties had decided not to seek an upward referral to the Commission, the case would have been scrutinized by three different NCAs, ensuring a more than adequate assessment of its impact on competition. Moreover, as explained below, *Facebook/WhatsApp* is not the tip of an iceberg. It is a lone seagull, an outlier, circling an iceberg, which is itself composed of transactions for which the current system of jurisdictional rules remains entirely relevant and appropriate.

2. No Enforcement Gap in Digital Economy Transactions

(a) *Transactions Involving Large Troves of Data*

Data collection and data analytics are becoming part of virtually all economic activity. “Big Data” is a catch-all term to describe the trend toward using large volumes of structured and unstructured data to provide new types of analytics and other services. These services may be consumer-facing, such as a search engine or an online shopping platform. Or they may be business-facing, such as a programmatic display advertising platform or customer sales and management software. The “Big Data” label is of limited use analytically, however. Most data, Big Data included, can be placed into one of three general categories: it may comprise a *product* in its own right; or it may form an *input* to provide and improve the functionality or utility of analytics services or products; or it is simply *irrelevant*— just generated data as a side-product of some service that is not used for anything.

Companies increasingly rely on “machine learning” and “artificial intelligence” using large data sets for the creation, operation, and improvement of applications, products, and services. This use of data is not contained to a single industry or application, however. Pharmaceutical companies and innovative health providers are using data to deliver new treatments and better health outcomes. States and municipalities are using data to manage utilities and deliver infrastructure improvements. Retailers use data to gauge demand, manage their inventory, and set prices. Sensors in airplanes, oilfield equipment and assembly line robots capture and transmit data enabling operators and suppliers to monitor and optimize performance and carry out maintenance before the equipment fails. And, perhaps most visibly, some of today’s most popular online apps and services such as online search rely on large sets of data.

There is no general need to change the EUMR thresholds to catch competitively significant “Big Data” deals. In fact, such thresholds would create a disproportionate number of false positives. It is highly unlikely that a dataset is at the same time (i) disassociated from an activity generating meaningful revenues and (ii) unique and competitively significant.

First, data collected is typically part and parcel of the revenue-generating business (*i.e.*, sales of products or services). In some cases, data is collected from users of an online service (typically provided for free). Still this data is linked to a revenue-generating activity such as advertising (although in the case of software telemetry data the data has no material commercial value outside its use in monitoring the performance of the specific software product generating the data). In short, in the post-Unicorn era, it is unlikely that any entity would collect and manage a large trove of data from a significant user base without also having a reliable, proven monetization model (*see* also Section I.2.(b) below). The predictive value of data may increase with scale. For example, an oil field equipment supplier having a large installed base of equipment operating under a variety of conditions may be able to make more accurate predictions regarding maintenance needs than a competitor with a smaller

installed base. Companies that have a large installed base are also highly likely to generate significant revenues.

Second, only the “unique” datasets that are relevant in an antitrust sense could possibly raise competition concerns.³ And in a world where everything and everyone generate data, it is rarely the case that a dataset is at the same time unique and competitively significant. In *Microsoft/LinkedIn*, Salesforce argued that access to LinkedIn’s data was necessary for the development of ML functionality for Customer Relationship Management (“CRM”) software. The market investigation showed otherwise. There were many other sources of data available for development of ML technology for CRM.⁴ As rivals SAP and Oracle explained: “*LinkedIn is only one data source. Depending on the use case, other types of data might be more relevant than LinkedIn. It is difficult to predict how this will evolve in the future*” and “*there is not one dataset with the highest value [as input for ML], but that it is about having numerous types of data. Therefore, not only the quality, but also the quantity and the variety are important.*”⁵ As this example illustrates, it is uncommon that any single dataset is “must have” for a particular economic activity and as data sources increase exponentially, this occurrence will become even more exceptional. The Commission does not point to any examples to the opposite in the consultation materials.

(b) *Transactions involving Entities with a Significant User Base*

The Commission is concerned about digital economy deals “*where services are regularly launched to build up a significant user base before a business model is determined that would result in significant revenues*”.⁶ For the reasons explained below, such deals will likely be rare going forward. There is no need to change the existing clear and simple EUMR thresholds to capture what are at best a very limited number of outliers.

Analysts explain that the “Unicorn” era, when tech startups were valued at USD 1 billion or more without a proven monetization model, is coming to a close. In that era, the value of a new company’s growth often exceeded its known projected revenue generation (e.g., WhatsApp). However, many companies ultimately found that their initial business plans were unrealistic and did not work.⁷ Deals that would meet a material transaction value threshold without also meeting turnover-based thresholds are likely to decrease steeply.

Today, turnover is the most reliable indicator of market presence including for entities with a significant user base. An investment banker notes: “*[i]nvestor sentiment has changed... They embrace growth but they want to see a path to profitability and to cash flow*”.⁸ In the past, “*many businesses were able to claim a high valuation based on the number of users they could attract... even if they had no proven business plan*”.⁹ This is not sufficient any more.

³ See Speech of 9 September 2016, “Making data Work for us”, available at https://ec.europa.eu/commission/2014-2019/vestager/announcements/making-data-work-us_en.

⁴ Commission decision of 6 December 2016, Case M.8124, *Microsoft/LinkedIn*, para. 262.

⁵ Commission decision of 6 December 2016, Case M.8124, *Microsoft/LinkedIn*, para. 261.

⁶ See Questionnaire for public consultation, p. 20, Consultation’s evaluation roadmap, p. 20.

⁷ See http://www.huffingtonpost.com/aj-agrawal/why-startups-are-in-the-p_b_10556712.html.

⁸ See <https://www.bloomberg.com/news/articles/2015-12-31/with-startup-pile-up-2016-tech-ipos-will-face-tough-investors> (emphasis added).

⁹ See <https://www.ft.com/content/3a53fb48-39f8-11e6-9a05-82a9b15a8ee7>.

Analysts highlight the need for a “feasible and realistic business plan with attainable goals”.¹⁰

New tech companies with large user bases seem to understand this and increasingly develop a clear monetization model early on.¹¹ To persuade investors that their model is realistic, companies need to put it to work, ideally until they grow to profitability.¹² This means that by the time they are acquired by other players (or go public with an IPO) the companies concerned will likely have meaningful revenues such that competitively significant transactions are caught by the turnover thresholds at EU or national level. For instance, Uber is valued today at USD 28-63 billion¹³ and had revenues of approximately USD 2 billion in 2015 and projected revenues of 5 billion in 2016.¹⁴ Airbnb is valued today at USD 30 billion.¹⁵ It had revenues of approximately USD 900 million in 2015, projected to reach USD 1.7 billion in 2016.¹⁶ An acquisition of these companies would likely trigger EU filings or multiple filings at Member State level.

Even in consumer communications where traditionally users expect services for free and monetization is not straightforward (as illustrated by *e.g.*, WhatsApp or Viber),¹⁷ the new players today understand that they need a proven business model early on. Snapchat’s behavior confirms this. Its revenue for 2016 was above USD 350 million and is set to exceed USD 1 billion in 2017. Snapchat is valued today at USD 25 billion.¹⁸

(c) *Transactions Involving New Technology*

Many digital economy transactions involve targets that do not have a “business” in the sense of an activity generating a stable flow of revenues. They are acquired because of their talent, innovative ideas and technologies that the acquirer considers a good fit with its existing assets and technological trajectories. Only in the past two years, Mergermarket has recorded more than 5,000 transactions in computer services, computer software, and Internet and e-

¹⁰ See http://www.huffingtonpost.com/aj-agrawal/why-startups-are-in-the-p_b_10556712.html.

¹¹ Investors cautions against investing in tech companies that have no obvious monetization plan, even if they show signs of growth (see http://www.sharesoc.org/unprofitable_companies.html).

¹² Cf. “Two years ago [in 2014], the only question [investors] were asking was ‘is this a big idea?... Now they are asking two questions: is this a big idea? And do you have a reasonable plan to grow to profitability without too much cash?’” (see <http://www.inc.com/magazine/201611/jeff-bercovici/from-pivot-to-profit.html>).

¹³ See <https://www.bloomberg.com/news/articles/2016-08-17/an-expert-in-valuation-says-uber-may-have-already-peaked>.

¹⁴ See <https://techcrunch.com/2016/12/21/uber-losses-expected-to-hit-3-billion-in-2016-despite-revenue-growth/>.

¹⁵ See <https://www.bloomberg.com/news/articles/2016-06-28/airbnb-seeks-new-funding-at-30-billion-valuation>.

¹⁶ See <http://www.sramanamitra.com/2016/01/04/2016-ipo-prospects-airbnb-sees-skyrocketing-valuations/> and <http://www.bizjournals.com/sanfrancisco/news/2016/09/01/airbnbs-revenue-soars-compared-to-hotels.html>.

¹⁷ WhatsApp had revenues of USD 10.21 million in 2013 and in 2014, was acquired by Facebook for USD 19 billion (<http://www.adweek.com/socialtimes/whatsapp-financial-results/438912>). Viber had revenues of USD 1.52 million and was sold to Rakuten for USD 900 million in 2014 (<https://www.techinasia.com/rakuten-acquisition-reveals-viber-has-100-million-active-users>).

¹⁸ See <https://www.bloomberg.com/gadfly/articles/2016-10-07/snapchat-ipo-5-charts-explaining-why-it-s-worth-25-billion>.

commerce.¹⁹ The large number of deals reflects the fundamental changes that sweep across the global economy. Rapid technological development drives commercial activity and due to low barriers to entry for startups ideas can and do come from everywhere. No single firm – even of the size of Microsoft – can develop internally all the technology that it needs. The pool of talent outside any organization is vastly greater than its internal resources and tapping into this external pool is critical to the continued success of any organization. Microsoft and many others embrace the open source community because it opens the door to great talent and resources.²⁰ Acquisition of startups is another way to tap into this large pool of resources and talent. Almost all of the approximately 35 acquisitions that Microsoft made in 2015 and 2016 fall into this category.²¹ To keep up with rapid technological development, companies in every sector of the economy acquire ideas and technology developed by myriads of startups.

For example, in 2016 General Motors acquired for USD 1 billion Cruise Automation which develops autonomous vehicle technology. At the time, Cruise Automation had not launched any products but its self-driving car software was attractive to General Motors due to the industry focus on autonomous vehicles.²² Automobile manufacturers like General Motors are not alone in investing in this technology. Amazon, Google, Uber and many others do so as well. Another example is machine learning (“ML”) technology. Many companies develop and acquire ML and analytics technology for a range of purposes. Microsoft is one of those companies. In 2015, Microsoft acquired VoloMetrix²³ and Revolution Analytics²⁴ for USD [REDACTED] and USD [REDACTED] respectively, in order to complement its own development efforts and enhance the capabilities of its Azure cloud platform.

The Commission should not be concerned by the fact that sometimes companies are willing to pay a high price for new technology and talent. Companies invest billions in productive assets and the value of any given technology depends on its importance to the acquirer, overall demand, and the cost and time to market of “build v. buy”. Companies that develop *e.g.*, promising autonomous driving or ML technology will likely have a high price tag because there is significant demand from entities operating in a variety of sectors and ML engineering talent is a scarce resource. High deal value is not an indication of strategic value in terms of creating or maintaining market power. It is simply an indication that the buyer values the target’s talent, ideas, or technologies because they complement its current commercial trajectory.²⁵ Vehicle manufacturers all invest in autonomous vehicle technology because it is the next frontier of the automobile industry. General Motors’ acquisition of companies like Cruise Automation does not close the door to others. In the technology sector, there are many poles of research – not few. Such acquisitions simply help solve some of the many challenges associated with developing autonomous vehicles. Acquisitions of startups are a sign of healthy innovative markets and not activity that warrants special jurisdictional measures under merger control. When acquisitions aim at enhancing the

¹⁹ <https://www.mergermarket.com/homepage> for CY 2015 and 2016.

²⁰ <https://techcrunch.com/2016/11/16/microsoft-joins-the-linux-foundation/>.

²¹ [REDACTED]

²² <http://fortune.com/cruise-automation-general-motors-driverless-cars/>.

²³ <https://techcrunch.com/2015/09/03/microsoft-acquires-volometrix/>.

²⁴ <https://blogs.microsoft.com/blog/2015/01/23/microsoft-acquire-revolution-analytics-help-customers-find-big-data-value-advanced-statistical-analysis/>.

²⁵ See Section III.1.(a) and (d) below regarding the subjective nature of the transaction value.

acquirers' market position in overlap markets and the overlaps are competitively significant, targets are likely to have revenues that trigger either EU or Member State notification thresholds.²⁶

3. No Enforcement Gap in the Context of the ECN

For the reasons explained above, digital economy deals with significant value where the target has significant market presence but does not generate meaningful revenues will be very rare in the post-Unicorn era. In most cases where the target has significant market presence, the acquirer will have meaningful revenues (worldwide and in Europe) and the target will also have some revenues in Europe (if it is active there). Such digital economy deals will likely be caught by either the EUMR thresholds or by a number of Member States that have low jurisdictional thresholds, *e.g.*, Austria (a single-trigger jurisdiction based on acquirer's turnover only), Spain and Portugal (both having market share thresholds), Germany and other Member States (where the target revenues triggering a filing are EUR 5 million or less).²⁷

When a digital economy deal meets Member State thresholds, the NCAs concerned may well be the best placed to review the transaction. The Commission should not assume jurisdiction over all digital economy transactions above a certain value threshold. There is no basis for assuming that by nature all such deals have an EU dimension and may affect the internal market.

- *Uptake of digital economy services can differ significantly in the various Member States.* In 2014 (the year it was acquired by Facebook), WhatsApp's usage ranged from 3% (in Poland) and 6% (in France) to 65% in Spain and 62% in the Netherlands.²⁸ Similarly, in 2014Q3-2015Q1, 12% of internet users used Snapchat in Ireland but only 2% in Italy.²⁹ The competitive landscape in digital economy services can also differ significantly from one Member State to another. In *Microsoft/LinkedIn*, the Commission found that LinkedIn faced competition in Germany and Austria from Xing, in France from Viadeo, and in Poland from GoldenLine. These players were not active in Member States other than their home turfs.³⁰ If Xing or GoldenLine were acquired today, there is no reason why the Commission should look at the transaction (even if the deal value was substantive – *e.g.*, Xing is valued at EUR 1 billion). Such geographically confined transactions would hardly affect the internal market.
- *Digital economy services are often monetized through advertising.* The Commission consistently finds that the geographic market for online advertising is national.³¹ This

²⁶ For instance, Tech Data's acquisition of Avnet has been notified to the Commission and Oracle's acquisition of Netsuite was notified (and cleared) in Austria and Cyprus.

²⁷ *E.g.*, Cyprus (target needs to have worldwide turnover of EUR 3.5 million and generate turnover in Cyprus); Estonia (target needs to have local turnover of EUR 2 million); Germany (target needs to have local turnover of EUR 5 million and at least EUR 10 million worldwide. Germany is also proposing to amend its law to introduce a transaction value threshold that will be met irrespective of the target's turnover); Hungary (target needs to have local turnover of EUR 3.2 million); Ireland (target needs to have local turnover of EUR 3 million); Latvia (target needs to have local turnover of EUR 1.5 million); Lithuania (target needs to have local turnover of EUR 1.45 million); and Slovenia (target needs to have local turnover of EUR 1 million).

²⁸ See <http://t.co/myUuPPVXfa>.

²⁹ See <http://www.ignitesocialmedia.com/social-media-stats/snapchat-stats-marketers/>.

³⁰ Commission decision of 6 December 2016, Case M.8124, *Microsoft/LinkedIn*, paras. 121-125 and 285.

³¹ Commission decision of 6 December 2016, Case M.8124, *Microsoft/LinkedIn*, para. 164 and fn. 129.

means that a digital economy service can be successful/profitable in one Member State but not in others.

Digital economy transactions with potential impact on the internal market that are not notified to the Commission can still be referred under Articles 4(5) and 22 EUMR.

(a) *Article 4(5) EUMR*

Article 4(5) EUMR allows the parties to a concentration to request referral of the case to the Commission if it does not meet the thresholds of the EUMR and has to be notified in at least three Member States.

There is no empirical evidence showing that parties avoid referrals in particular in digital economy deals with high transaction values – rather, the Commission acknowledges that the referral system is “*popular with stakeholders*”.³² In 2014, Facebook and WhatsApp decided to refer their transaction to the Commission. Going forward, with the simplification that the Commission envisages in its ongoing consultation,³³ parties can be expected to use the referral system more often to benefit from a faster and more seamless process.

(b) *Article 22 EUMR*

Under Article 22 EUMR, one or more Member States that are competent to review a transaction under their national law may request a referral to the Commission within 15 working days of the date it was notified to them. This means the Commission does not have to depend on the merging parties to get referrals.

To the extent a case can have an impact on the internal market, an NCA may refer it to the Commission. Instead of proposing new thresholds (which by nature are difficult to implement), the Commission should facilitate coordination within the European Competition Network (“ECN”) to make sure NCAs scrutinize carefully the impact of tech deals on the internal market and make use of Article 22 EUMR where needed.

II. **Additional Thresholds Undermine the Fundamentals of the Merger Control System in Europe**

The development of additional thresholds could undermine some of the basic features of merger control in Europe, which according to the Commission are “*well proven*”.³⁴

1. **Turnover-Based Thresholds**

By definition, no meaningful threshold can capture *all* transactions which may have an impact on the internal market. The EU merger control system uses turnover-based thresholds that define the Commission’s jurisdiction in clear terms so as to ensure clarity and legal certainty.

The additional thresholds that the Commission is now considering to capture false negatives run the risk of also catching a disproportionate number of false positives and create costs and

³² White Paper, “Towards More Effective EU merger control”, COM(2014)449, Section 4.2.1.1, item 3.

³³ White Paper, “Towards More Effective EU merger control”, COM(2014)449, paras 65ff.

³⁴ See Commission Staff Working Document, White Paper – Towards more effective EU merger control, SWD(2014)221, para. 5.

uncertainties for businesses while diverting internal resources at the Commission from the analysis of transactions posing real issues. The current turnover thresholds have not been updated since 2004 and the basic thresholds of EUR 5 billion (worldwide) and EUR 250 million (EU-wide) have not been adjusted since the introduction of EU merger control despite inflation and the substantial increase in the number of Member States. This means that today the Commission reviews many more mergers than the EUMR intended when the thresholds were introduced. The clearest evidence of this is the number of transactions that despite meeting the thresholds are treated under the simplified procedure. In 2016, 67% of cases requiring a notification under the EUMR were eligible for simplified procedure.³⁵

2. The Concept of the “Concentration”

Under Article 3(1) EUMR, a concentration only covers operations where a change of control occurs on a lasting basis on an undertaking or parts of it including legal entities or assets. In every case, however, for a “concentration” to arise within the meaning of the EUMR it must concern a *“business with market presence, to which a market turnover can be clearly attributed”*.³⁶ Revenues are a key element of EU merger control, as they are a proxy for market presence, both in jurisdictional terms and from a substantive standpoint (in the vast majority of cases, market shares – the starting point of any competitive assessment – are based on revenue shares). Additional thresholds not based on turnover risk undermining the very definition of “concentration” under the EUMR and the Jurisdictional Notice.

3. The Commission and the NCAs

Currently, the EUMR *“uses a bright-line test based on certain turnover thresholds to distinguish concentrations with an EU dimension from those subject to national merger scrutiny. These thresholds are complemented by a case referral system that allows re-allocation of individual cases where the bright-line fails as a proxy for the European or cross-border dimension of a merger”*.³⁷ This system works well and there is no need to open a Pandora’s box.

In a system based on spheres of exclusive competence any extension of the Commission’s jurisdiction corresponds a reduction of Member State jurisdiction and any EU-level “one-stop-shop” for merger control of digital economy deals will likely face resistance by the Member States. All the more so, given the increased interest in this sector that NCAs in Germany, France,³⁸ the Netherlands,³⁹ and elsewhere have shown. Given the referral system in the EUMR, the current regime ensures that the Commission will review the most competitively significant transactions in the digital economy. Such transactions likely exceed the low jurisdictional thresholds in countries like Austria, Cyprus, Germany or Ireland and/or

³⁵ The percentage of cases requiring notification under the EUMR that were decided under the simplified procedure was 66% in 2015 and 68% in 2014. See <http://ec.europa.eu/competition/mergers/statistics.pdf>.

³⁶ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C95/1, para. 24.

³⁷ See Commission Staff Working Document, White Paper – Towards more effective EU merger control, SWD(2014)221, para. 126 (emphasis added).

³⁸ See http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html;jsessionid=4D8801FC27A666C3526D67D4C3AB4E3A.1_cid371?nn=3591568.

³⁹ See <https://www.acm.nl/en/publications/publication/16342/Taking-a-closer-look-at-online-video-platforms/>.

market-share based regimes (some of which, such as Spain or Portugal, do not even require a competitive overlap, thus catching purely conglomerate transactions). Moreover, Member States like Germany are currently broadening their jurisdictional thresholds including by adding a transaction value threshold.⁴⁰ A transaction requiring multiple filings will either be reviewed by several NCAs in parallel, operating under shared legal standards and cooperating within the ECN; or it will be referred to the Commission, either by the parties or by one or more NCAs. The example of *Facebook/WhatsApp* illustrates this.

4. No Suitable Substantive Assessment Tools

New thresholds capturing more deals within the scope of the EUMR make no sense unless their competitive significance can be assessed in a reliable and predictable manner. This is unlikely to be the case today. Assuming the target is a tech company that has generated no (or limited) revenues, the tools the Commission has at its disposal to conduct an evidence-based assessment within a short timescale are limited. No (meaningful) market shares are available. Nor can the Commission ask customers for input (there are no customers yet or they are all consumers who are difficult to reach in the context of market testing). The analysis is necessarily reduced to the Commission's or the complainants' subjective views as to how the market might develop. The dynamic and unpredictable character of tech markets makes any assessment highly speculative. Without cogent evidence that tech deals raise serious competition concerns that escape merger review, it would be premature to alter a system that has worked well for almost 30 years.

III. The Additional Thresholds Envisaged are Not Effective

1. Transaction Value

A complementary jurisdictional threshold based on the value of the transaction would add uncertainty to the current regime of EU merger control, without any material benefit to the effective enforcement of merger control rules.

(a) *The Transaction Value is Subjective*

The concept of deal value is complex and can change materially over short periods. For instance, it will be very difficult for parties to estimate upfront the value of a deal with a share consideration element. This is subject to market volatility and other micro- and macro-economic criteria going forward. Ultimately, estimating the value of a transaction that might trigger a filing depends heavily on the parties. For example, the parties often agree to create a post-transaction price mechanism for the benefit of the seller, *e.g.*, involving a share of future profits. In these cases, the true value of the deal can only be calculated post-closing. It will not be apparent at the time when the parties need to decide whether to notify a deal.

(b) *No Nexus Between the Transaction Value and User Base of the Target*

There is no direct relationship between the transaction value and the user base that the target company has. For example, Microsoft acquired LinkedIn for USD 26 billion. LinkedIn had [REDACTED] monthly active users MAU and [REDACTED] daily active users ("DAU"). A competing social networking service provider, Twitter, with approximately 3 times more

⁴⁰ See <http://www.bmwi.de/BMWi/Redaktion/PDF/G/neunte-gwb-nouvelle.property=pdf.bereich=bmwi2012.sprache=de.rwb=true.pdf>.

MAUs⁴¹ and seven times more DAUs⁴² is valued today at USD 15.7 billion⁴³ and is facing significant difficulties in finding a buyer⁴⁴ *inter alia* because it does not have a robust monetization model.

(c) *No Nexus Between the Transaction Value and the Data Held by the Target*

There is no direct relationship between the transaction value and the amount or the quality of data that a company collects and manages. For example, Facebook purchased WhatsApp for USD 19 billion. WhatsApp did not collect much user data and Facebook has continued WhatsApp's roll out of end-to-end encryption, which means that message content cannot be accessed and monetized today either. This strongly suggests that WhatsApp's valuation was not data-driven. Microsoft purchased LinkedIn for USD 26 billion. [REDACTED]

(d) *No Nexus Between the Transaction Value and the Competitive Significance of a Deal*

The value of the transaction is not directly indicative of any form of market impact of the deal. Unlike turnover (an objective and easily verifiable metric based on sales in the market), transaction value is a subjective criterion that depends on the views of two entities only, the purchaser, and the seller. Many factors can push up the transaction value, including the subjective interest of the acquirer and the parties' negotiation skills. A high transaction value does not in itself denote competitive significance. This is illustrated by recent transactions in the consumer communication services sector.⁴⁶ The price paid per Skype MAU was more than double the price paid per WhatsApp MAU. And yet, WhatsApp has doubled its MAUs in the past two years (2014-2016) to reach 1 billion MAUs, while the number of Skype MAUs remains at approximately 300 million, more than 5 years after its acquisition by Microsoft. Skype's user base is comparable to Viber's (260 million MAUs) although the price paid per Viber MAU was more than 7 times lower as shown in the Graph below:⁴⁷

⁴¹ Twitter has 310 million MAUs. See <https://about.twitter.com/company> (as of 31 March 2016).

⁴² Twitter has 140 million DAUs. See <http://www.bloomberg.com/news/articles/2016-06-02/snapchat-passes-twitter-in-daily-usage> (as of June 2016).

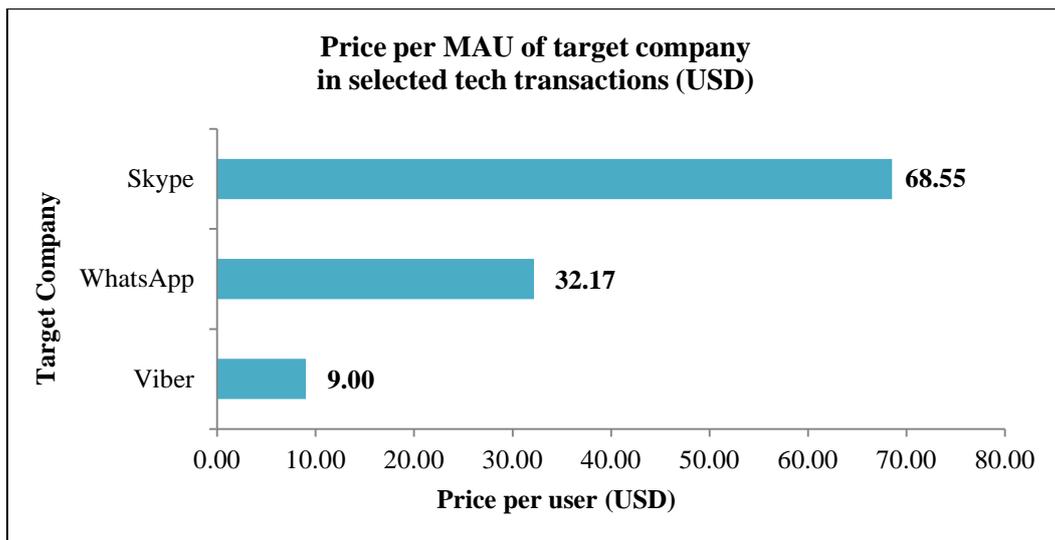
⁴³ See <http://www.forbes.com/sites/greatspeculations/2016/09/26/in-any-acquisition-heres-how-much-we-think-twitter-is-worth/#45d4b34c6e98>.

⁴⁴ See <http://www.techtimes.com/articles/181150/20161007/whos-buying-twitter-not-google-apple-or-disney.htm>.

⁴⁵ [REDACTED]

⁴⁶ See <https://www.statista.com/statistics/222363/price-per-user-at-selected-tech-acquisitions/> and <https://www.statista.com/chart/1934/facebook-paid-42-dollars-per-whatsapp-user/>.

⁴⁷ All calculations are based on information available in the public domain.



(e) *The Transaction Value is Difficult to Allocate Geographically*

If the Commission was to use transaction value as a jurisdictional threshold, it would need to establish a nexus between the transaction value and the EU. Geographic allocation of deal value is very difficult as the experiences of other regimes (Argentina, Mexico, *etc.*) confirm. Deal value could be apportioned based on (i) the location of the target’s assets; or (ii) the target’s sales by country; or (iii) a more substantive assessment (*e.g.*, the geography where the companies identify market opportunities for the future). Criteria (i) and (ii) are impractical when the target has only limited or no sales and limited assets. Criterion (iii) is not clear-cut and involves a subjective assessment.

2. Thresholds Related to Data

Going forward, data will be collected and analyzed by every company in every sector of the economy. The amount of data a company collects cannot in itself be a criterion requiring filing of any transaction involving that company. Commissioner M. Vestager has made this clear: “[it] doesn’t mean there’s a problem, just because you hold a large amount of data. After all, the whole point of big data is that it has to be big”.⁴⁸ She added that “the problem comes if that data really is unique and can’t be replicated by anyone else. But really unique data might not be that common”.⁴⁹ As explained above, there is no meaningful and workable nexus between transaction value and the amount or the quality of the data a company collects. Nor is Microsoft aware of any other jurisdictional threshold that would capture any putatively relevant “uniqueness” of the data involved in a transaction while being sufficiently clear-cut to ensure legal certainty.

⁴⁸ See Speech of 29 September 2016, “Big Data and Competition”, available at http://ec.europa.eu/commission/2014-2019/vestager/announcements/big-data-and-competition_en (emphasis added).

⁴⁹ See Speech of 9 September 2016, “Making data Work for us”, available at https://ec.europa.eu/commission/2014-2019/vestager/announcements/making-data-work-us_en.

3. Thresholds Related to Asset Value and Market Shares

Other jurisdictional thresholds like asset value and market shares are used in many countries around the world. However, they are not suitable to capture transactions where the target has only a user base or a dataset or a disruptive technology and no (or limited) market presence.

Indeed, such companies generally also have very limited assets. In today's world of cloud computing, no start-up needs or indeed wants to own the assets required to deliver the service. Snapchat is built on Google's cloud.⁵⁰ The role played by IP is also not as significant as in other technology-based industries.

It is also complex to estimate shares for a company with no (or limited) market presence. Relevant market definitions in the digital economy space remain largely uncharted territory which further confirms that using shares of supply as part of a system of mandatory *ex ante* control is far from straightforward.

For all the reasons explained above, Microsoft submits that additional jurisdictional thresholds should not be developed. Microsoft also takes the view that this consultation should act as a launch pad for further investigation and discussion. Microsoft remains available to support the Commission in this investigation and engage in further discussions to explain industry and market trends in the digital economy sector.

⁵⁰ See <http://www.businessinsider.com/snapchat-is-built-on-googles-cloud-2014-1?IR=T>.