

13 January 2017

Reference: HT.3053

RESPONSE OF KONINKLIJKE PHILIPS N.V.¹

TO

CONSULTATION ON POSSIBLE IMPROVEMENTS OF THE MERGER REGULATION “Evaluation of procedural and jurisdictional aspects of EU merger control”

1. Koninklijke Philips N.V. (‘Philips’) welcomes the opportunity to submit comments to the European Commission (‘the Commission’) consultation ‘Evaluation of procedural and jurisdictional aspects of EU merger control’. Philips’ comments focus on the proposed extension of the Commission’s jurisdiction to certain large transactions that do not meet the existing turnover thresholds.
2. Following one transaction that reached the Commission’s merger review through the Member States – *Facebook/WhatsApp* – the Commission now queries whether there is an enforcement gap, and whether this gap should be plugged with an additional jurisdictional test. Philips submits that the current turnover-based threshold system has worked effectively in the past to ensure that the Commission and National Competition Authorities (NCAs) review relevant merger cases. Philips does not believe that *Facebook/WhatsApp* points to a structural enforcement gap. Moreover, an additional jurisdictional test would be disproportionate to prevent the re-occurrence of an incident.
3. First, the number of no-turnover or low-turnover transactions is very small. Even in this digital age, the large majority of *unicorns*² have significant turnover. Every provider of ‘free’ services – Google, Facebook, BuzzFeed – generates substantial turnover with advertising revenues. Companies active in the deceptively labelled sharing economy – Uber, AirBnB, Deliveroo – generate transaction fees from taxi drivers, home owners and restaurants respectively. WhatsApp’s almost complete lack of turnover is very, very rare. This is underlined by the fact that the European Commission is soliciting examples of similar transactions but, to the best of our knowledge, no convincing examples have been presented.

¹ Transparency Registry No.: 02341041540-74.

² Start-up companies valued over USD 1 billion.

4. Second, Facebook/WhatsApp does not demonstrate a real enforcement gap: the transaction was caught in the Commission's net through the jurisdiction of three EU Member States over the transaction. Should a similar acquisition of an important service provider without meaningful turnover exist, such a transaction is likely again caught by the merger control thresholds of three or more Member States, and the acquirer will likely again seek predictability at the Commission's one-stop-shop.
5. Third, the importance of an enforcement gap at the EU level is greatly reduced by the jurisdiction of every individual national competition authority. A single national competition authority reviewing the type of global transactions that the Commission is concerned about, could equally well protect the interests of European consumers. Admittedly, a national competition authority will require remedies that protect the interests of consumers in its national territory; but Philips finds it difficult to envisage a situation in which these remedies would not automatically cover other European consumers, given the global nature and policies of the type of online services that the Commission is concerned about. There is little reason for the European Commission to be fixated on its own jurisdiction.
6. Fourth, any remainder of a gap in merger control does not mean European consumers will be harmed. In Philips' view, the *Continental Can* case law still allows the European Commission and national competition authorities to make an ex post enquiry into acquisitions that an authority suspects to have been anti-competitive. By way of example: the Dutch competition authority has imposed a fine for an anti-competitive non-notifiable transaction in the context of a cartel procedure (in the Flour-case, multiple flour mills had acquired assets with a view to foreclosing the market to new entrants). Moreover, this possibility of an ex post enquiry will likely prevent anti-competitive effects of a non-notifiable but widely published acquisition.
7. Proponents of the new merger control threshold argue that a sufficiently high threshold should hardly be a burden on businesses. Philips disagrees with that view and respectfully points to the wider perspective. First, adding rules without a discernable enforcement gap is at odds with a key message of the Juncker administration: "*where there is unnecessary red tape, we will cut it*". Second, that view ignores the example that the European Commission sets for other competition authorities. Adding complexities to the EU's jurisdictional threshold may inspire dozens of competition authorities to add and complicate jurisdictional thresholds. A policy error by the European Commission likely reverberates in, and is amplified by other competition authorities.
8. As an aside, Philips voices its hopes that the invocation of *Facebook/WhatsApp* does not suggest that the Commission seeks to use merger control to solve non-competition issues. That transaction attracted the public attention primarily due its potential impact on the privacy of European consumers. Philips believes the European Commission should be reluctant in using merger control to raise the level of privacy protection. Currently, DG COMP can and should assess the transactions that could limit choice for consumers, including choice between a higher or lower level of privacy protection, if parties compete on their level of

privacy. However, DG COMP is not well placed to balance consumer privacy with benefits to consumers associated with the combination of databases of the acquirer and the target. In the *Facebook/WhatsApp* case, the Commission commendably limited its review to competition concerns. However, before reaching that conclusion, it did assess whether Facebook could start collecting data from WhatsApp users to introduce new advertising products (para. 185 and 186), and it is not clear to Philips whether the Commission envisaged weighing the benefits of new products to consumers against the potential impact on consumers' privacy.