

EN

Case No COMP/M.7047 - MICROSOFT/ NOKIA

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 04/12/2013

***In electronic form on the EUR-Lex website under
document number 32013M7047***



Brussels, 4-12-2013
C(2013)8873

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.7047 – Microsoft/ Nokia
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹**

- (1) On 29 October 2013, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which Microsoft Corporation ("Microsoft", US) will acquire sole control over substantially all of the Devices & Services business (the "D&S Business") of Nokia Corporation ("Nokia", Finland). Microsoft and the D&S Business are collectively referred to as "the Parties".

1. THE PARTIES

- (2) Microsoft is a US-based multinational technology company primarily involved in the design, development and supply of computer software, hardware devices and related services. In the past decade, Microsoft has expanded its business from operating systems ("OSs") and PC based productivity software into consumer hardware (including gaming consoles, portable digital music players and, most recently, tablets). It develops and licenses the Windows operating system for server, PC and mobile devices and supplies a variety of software applications as well.
- (3) The D&S Business comprises Nokia's Mobile Phones and Smart Devices business units as well as design team and operations (including production facilities, sales and marketing activities and related support functions). The Mobile Phones business unit

¹ OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

focuses on the development and supply of basic/feature mobile phones and related software, while the Smart Devices unit covers smartphones and the recently launched Lumia tablet.

2. THE CONCENTRATION

- (4) Pursuant to a Stock and Asset Purchase Agreement signed on 2 September 2013, the acquired D&S Business includes the 'Mobile Phones and Smart Devices' business unit, design team and operations including all of the D&S Business production facilities, Devices & Services-related sales and marketing activities, related support functions, and non-standard essential patents ("non-SEPs")² that read on the devices being produced by the D&S Business. Microsoft will also receive from Nokia a 10-year non-exclusive license to approximately 30 000 SEPs, non-SEPs and pending SEP and non-SEP patent applications (if any), with an option to extend to perpetuity against further compensation.

3. EU DIMENSION

- (5) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million³. Microsoft had a world-wide turnover of EUR 75.5 billion in its financial year ending June 2013. The D&S Business had a world-wide turnover of EUR [...] billion in 2012. Both of them had an EU-wide turnover in excess of EUR 250 million. Microsoft had an EU-wide turnover of EUR [...] billion in its financial year ending June 2013. The D&S Business had an EU-wide turnover of EUR [...] billion in 2012. Both do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

4. COMPETITIVE ASSESSMENT

- (6) Microsoft is active in a number of sectors that are relevant for the assessment of the proposed transaction. In more detail, Microsoft manufactures and supplies the Surface series of tablet devices. Microsoft also develops and licenses an OS for smartphones (Windows Phone), OSs for tablets (Windows RT and Windows 8) as well as applications running on top of its own and/or third party mobile OSs, including Skype and Microsoft Office Mobile. Microsoft further develops and licenses Microsoft Exchange, an enterprise mail server software product, and Exchange ActiveSync ("EAS") a protocol managing communication and synchronisation between smart mobile devices and Microsoft Exchange.
- (7) The D&S Business is active exclusively in the manufacturing and supply of basic and feature mobile phones, smartphones and tablet devices.
- (8) In light of the above, the sectors that the Commission takes into account in the assessment of the proposed transaction are the following: (1) manufacturing and supply of mobile devices; (2) developing and licensing of mobile OSs; (3) developing and licensing of applications for mobile smart devices; and (4) developing and licensing of email server software and related synchronization protocols.

² For the purposes of this Decision, non-SEPs are defined as patents that are not technically indispensable to be able to implement standardised technology.

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

4.1. Relevant markets

4.1.1. Relevant product markets

- (9) Microsoft submits that the proposed transaction involves the market for mobile ecosystems. According to Microsoft, “ecosystems” comprise a broad set of software products and services (including OS functionality, applications, and cloud services) running on multiple devices, including smartphones, tablets and PCs. None of these elements compete in isolation. Rather, they are part of broader ecosystems that compete with each other to attract users, device makers and application developers.
- (10) Microsoft also submits that consumers choose an ecosystem based upon a number of factors, including availability of “must have” applications (“apps”) and a wide choice of other apps, attractiveness and functionality of devices, total cost of ownership (including connectivity), the attractiveness of the user interface and the “user experience” more broadly. Individual users may weigh these factors differently, but the elements they weigh are fairly consistent. Enterprise users (and IT administrators) consider another set of ecosystem metrics, giving high priority to security, separation of business and personal accounts and total cost of ownership.

4.1.1.1. Mobile devices (basic and feature phones, smartphones and tablets)

4.1.1.1.1. View of the Notifying Party

- (11) Microsoft submits that basic and feature phones are not part of the same relevant product market as smartphones.⁴ In terms of physical characteristics such as screen size and processing power, but also based on their different operating system and pricing, smartphone devices can be clearly distinguished from basic and feature phones.
- (12) Microsoft also submits that the competitive assessment of the proposed transaction does not depend on whether smartphones and tablets⁵ are included in a single market for smart mobile devices or whether they are part of separate markets. However, Microsoft notes that, despite the on-going trend of convergence between smartphones and tablets, these two types of devices are not identical. Although a number of smart mobile devices referred to as “phablets” or “mini tablets” have been introduced on the market recently there is still a stable difference in size between smartphones and tablets. While most tablet screens are at least 7 inches, the screen size of smartphones rarely exceeds 5 inches. As regards technical characteristics, all smartphones support SIM card-based switched voice and SMS communication but tablets do not.
- (13) Microsoft further submits that there is no separate market for smart mobile devices for corporate users given the fact that current trends indicate “consumerisation” of mobile devices. Smartphones, and to a less extent tablets, are used both at home and at work since the Bring-Your-Own-Device (“BYOD”)⁶ policy is spreading within the business and corporate world. As a result, certain producers of smartphones include in

⁴ Basic phones are used primarily for calls and text messaging (“SMS”). Feature phones are wireless phones with limited Internet browsing and application capabilities. Smartphones are wireless phones with advanced Internet browsing and application capabilities.

⁵ Tablets offer enhanced multimedia and functionality to the end-user.

⁶ BYOD, as the name implies, refers to a policy whereby employees are allowed to use compatible personal smartphones for business purposes such as email and the syncing of calendar and contacts.

their product lines "business ready" smartphones that support advanced security features, data encryption and other features considered important by corporate users. Device manufacturers, such as Apple and Samsung, also offer the same smart mobile devices to both consumers and corporate users which would indicate that the potential boundaries between the smart mobile devices used exclusively by corporate users and those used by consumers are blurring.

4.1.1.1.2. Previous Commission decisions, results of the market investigation and Commission's assessment

- (14) In its decision in *Google/Motorola*,⁷ the Commission took the view that basic and feature phones may not fall into the same product market as smartphones. As to the existence of a single market for smart mobile devices, the market investigation in the *Google/Motorola* case was inconclusive, but suggested a difference in size and functionalities between these products. Ultimately, however, the Commission left the exact product market definition open.
- (15) The data gathered during the market investigation in this case indicated that basic and feature phones, on the one hand, and smart mobile devices, on the other hand, belong to separate product markets.⁸ Market participants indicated that these products are not substitutable from the demand-side, because, among other reasons, when compared to smart mobile devices, basic and feature phones have less advanced hardware components and connectivity services, and offer a limited choice of downloadable applications.
- (16) As regards the question whether there is a single market for smartphones and tablets, the results of the market investigation in this case were mixed. On the one hand, a large majority of the market players indicated that smartphones and tablets are comparable to one another in terms of technical characteristics (OS, hardware requirements) and for certain functionalities (web browsing, email access, watching videos, games, maps, etc.). On the other hand, a number of market participants indicated that there may not be demand-side substitution between the two types of devices.⁹ From the customers' point of view, smartphones offer certain functionalities that tablets do not offer (for example, the ability to make a telephone call), while tablets, due to their larger screen size, may be better suited than smartphones for other uses (for example, watching long videos, reading books or newspapers and/or extensive work sessions).
- (17) Finally, a number of market players noted that certain smart mobile devices are more suitable for corporate use than others because of design features (such as a physical keyboard) or their ability to securely access the corporate networks and mail systems.¹⁰ However, the market investigation also supported the Notifying Party's argument that most smart mobile devices can be customised for secure corporate use ("BYOD" policy).

⁷ Case COMP/M.6381 – *Google / Motorola Mobility*, Commission decision of 13 February 2012, paragraphs 41-42.

⁸ See replies to questionnaire Q1 to competitors of 29 October 2013, question 5.

⁹ See replies to questionnaire Q1 to competitors of 29 October 2013, question 6.

¹⁰ See replies to questionnaire Q1 to competitors of 29 October 2013, question 7.

- (18) The Commission considers that, for the reasons set out in paragraph (15) above, there are strong indications that basic and feature phones are not part of the same product market as smart mobile phones. The Commission therefore concludes that basic and feature phones, on the one hand, and smart mobile devices, on the other hand, belong to separate product markets.
- (19) Regarding smart mobile devices both for consumer and corporate users, the Commission considers that, while from a supply-side perspective, there are a number of similarities in functionality and characteristics between tablet devices and smart mobile phones, demand-side considerations may indicate the two types of devices belong to separate product markets.
- (20) With respect specifically to smart mobile devices for corporate users, the Commission takes the view that, whereas some mobile devices have physical characteristics and security features considered important by corporate users, the greater number of smart mobile devices can be customized in order to meet the specific requirements of business users.
- (21) In any event, for the purposes of the present case, whether smartphone and tablets belong to the same product market and whether separate product market(s) for smart mobile devices for consumer and corporate use should be identified, can be left open as the proposed transaction does not raise competitive concerns under any alternative product market definition considered.

4.1.1.2. Mobile OSs

- (22) Modern smart mobile device OSs combine the features of a personal computer OS, such as a file system and an application programming interface, with access to the hardware capabilities of a smart mobile device such as touchscreen, cellular coverage, Bluetooth, Wi-Fi, GPS mobile navigation, camera, video camera, speech recognition, voice recorder, music player, near field communication, and personal digital assistant (PDA). While some of the features of a smart mobile device are not dependent upon a technical interface with the mobile OS, others require a more substantial technical interface with that OS. Moreover, certain performance characteristics such as speed and available memory are at least partially influenced by the quality of the mobile OS. Therefore the mobile OS is a central part of a smart mobile device.

4.1.1.2.1. View of the Notifying Party

- (23) Microsoft notes that there is a convergence between OSs for PCs and OSs for smartphones and tablets, that is driven by increasing user demand for a similar user experience whether using a PC, smartphone or tablet.
- (24) Microsoft submits that OSs for feature and basic mobile phones fall into a distinct market that is not part of the market for OSs for smart mobile devices. Microsoft notes that mobile applications represent a significant portion of the average daily usage of smart mobile devices and that mobile applications for smart mobile devices are typically built on, and take advantage of, OS functionalities exposed through APIs (Application Programming Interface). OSs for feature and basic mobile phones generally do not include sophisticated APIs.
- (25) Microsoft further submits that the competitive assessment of the proposed transaction does not depend on whether mobile OSs for smartphones and mobile OSs for tablets form part of the same relevant product market, and in particular that, for purposes of this

transaction, the market definition may be left open as there are no competition concerns in any case.

4.1.1.2.2. Previous Commission decisions, results of the market investigation and Commission's assessment

- (26) In the *Google/Motorola* case, the market investigation provided strong indications that : (a) mobile OSs are distinct from PC OSs; (b) mobile OSs for smart mobile devices are distinct from mobile OSs for basic mobile phone devices; and (c) mobile OSs for smartphones and tablets are part of the same market.¹¹ However, the exact scope of the product market definition, and specifically, whether mobile OSs for smartphones and tablets belong to the same product market, was left open.
- (27) The Commission has no indication that, for purposes of the present transaction, the relevant market should be broadened to include PC OSs or basic and feature phone OSs. While there may exist some convergence between OSs for smart mobile devices and OSs for PCs, they continue to use different hardware, have different performance capabilities and therefore exhibit limited demand-side substitutability. Furthermore, the information gathered during the market investigation indicated that OSs for basic and feature phones and OSs for smart mobile devices belong to separate product markets due to the fact that OSs for smart mobile devices take advantage of more powerful hardware and must support a wider range of features including the availability of APIs, cloud capabilities, advanced video and graphics processing, and more powerful and integrated third-party applications.¹² In addition, OSs for smart mobile devices are updated by their supplier on a frequent basis, whereas basic and feature phone OSs readily installed on the device will only be "updated" by purchasing a new device.
- (28) A large majority of the respondents to the market investigation indicated that OSs for smartphones fall into the same relevant product market as OSs for tablets due to the similar hardware capabilities and OS functionality requirements of the smartphone and tablet devices; indeed, certain OSs (Android and iOS) are designed and developed to run on both smartphones and tablets.¹³
- (29) As regards a possible segmentation of the market for OSs for smart mobile devices for consumer and corporate users, the results of the market investigation suggest that such segmentation is not warranted.¹⁴ The majority of respondents point out that currently there is no mobile OS for which a significant number of corporate users would have a clear preference. In particular, all existing mobile OSs offer similar functionality in terms of security, remote management and interoperability with the existing enterprise IT infrastructure, and in particular Microsoft Exchange Server and the Microsoft Office suite of applications.
- (30) In any event, the Commission considers that for the purposes of the present case, the exact scope of the product market definition, and specifically, whether mobile OSs for smartphones and mobile OSs for tablets belong to the same product market, and whether

11 Case COMP/M.6381 – *Google / Motorola Mobility*, Commission decision of 13 February 2012, paragraph 29.

12 See replies to questionnaire Q1 to competitors of 29 October 2013, question 8.

13 See replies to questionnaire Q1 to competitors of 29 October 2013, question 9.

14 See replies to questionnaire Q1 to competitors of 29 October 2013, question 10.

there is a separate market for OSs for smart mobile devices for consumer and corporate users, can be left open as the proposed transaction does not raise competitive concerns under any alternative product market definition considered.

4.1.1.3. Apps for smart mobile devices

- (31) The Commission has investigated whether a distinction should be drawn between apps for smartphones and apps for tablets.
- (32) The information gathered during the market investigation indicated that apps for tablets are comparable in terms of features, functionality and price with those for smartphones.¹⁵ Some respondents pointed out that, while most apps are developed for both types of devices, some of them are customised or configured differently because of the size of the device (smartphone or tablet).¹⁶ These differences in configuration are likely to lose their importance. Some respondents submitted that apps developers create apps, which are designed to operate both on smartphones and tablets in case they run the same OS. Moreover, as indicated in paragraph (28) above, OSs running on smartphones and tablets provide similar capabilities and use similar hardware configurations.
- (33) In any event, the Commission considers that for the purposes of this decision, the exact scope of the market definition can be left open as the proposed transaction does not raise competitive concerns under any alternative product market definition considered.

4.1.1.3.1. Consumer communication services for smart mobile devices ("communication apps")

4.1.1.3.1.1. *View of the Notifying Party*

- (34) Microsoft submits that the market for consumer communication services includes all apps that offer some or all of the following functionalities: Instant Messaging ("IM") & presence, group IM chat, Voice over Internet protocol ("VoIP"), ("public switched telephone network") PSTN / VoIP, voice mail / video messaging, audio conferencing, video conferencing, document / photo sharing, email, SMS.
- (35) Microsoft also argues that consumer communication services are evolving rapidly, such that it has become increasingly artificial to distinguish individual communication functionalities. Users also have different views as to what constitutes "core functionalities". Users also switch easily and quickly between the three main types of services (IM, VoIP calls and video calls) during a single communication session.

¹⁵ See replies to questionnaire Q1 to competitors of 29 October 2013, question 11 and replies to Q2 to developers of apps for smart mobile devices, question 10.

¹⁶ As one respondent to the market investigation indicated, increased functionality is delivered in tablet apps along with more complex designs due to the larger screen size. With the recent trend of the screen size of smartphones getting larger and the tablet screen getting smaller, as well as constant improvements in smartphone performance capabilities, the differences in features, functionality and price of these two categories is becoming less significant. Many mobile apps operate on both types of devices.

- (36) Microsoft further submits that there is a single market for consumer communication services running on all mobile OSs, as an important number of communication services are running on multiple mobile OSs.¹⁷

4.1.1.3.1.2. *Previous Commission decisions, results of the market investigation and Commission's assessment*

- (37) In its *Microsoft/Skype* decision¹⁸, the Commission identified a separate market for consumer communication services, but left open whether the market needed to be further segmented such as by platform or by OS.
- (38) First, the Commission considered that consumer communication services should not be distinguished according to functionality because consumers increasingly demand a user experience that integrates a range of communication functionalities (for example instant messages, voice calls and video calls). The Commission also noted that most providers offer the whole range of functionalities.
- (39) Second, as regards a possible segmentation by platform (for example PCs, smartphones, tablets, gaming consoles and televisions), the Commission observed that consumer communication services are different in terms of features and quality on the different types of platforms, and that not all platforms were available to all EEA customers, making widespread substitution difficult.
- (40) Third, as regards a possible segmentation by OS, the Commission observed limited cross-OS availability, and noted that it was impossible for all consumers to switch between all existing consumer communication services because the choice was technically limited by the options available for the OS installed on the device.
- (41) Respondents to the market investigation in the present case pointed out that, while consumer communication apps are generally comparable to other apps (in terms of size, feature sets designed specifically for smart device form factors), their intended use (for communication purposes) and functionalities makes them different from other apps.¹⁹ For instance, in terms of functionalities, communication apps require the ability to input text accurately, allow for voice calls, and require enough screen space and a graphical user interface (GUI) for video calls. While consumer communication apps may therefore be separate from other types of apps, consistent with its findings in *Microsoft/Skype*, in the present case the Commission has no indication that the possible market for consumer communication apps should be further distinguished by functionality.
- (42) As regards a possible distinction by platform between smart mobile devices and desktops/laptops, the information gathered during the market investigation was mixed.²⁰ While a majority of respondents consider that communication apps are comparable to those

¹⁷ ChatON, Facebook, Fring, Nimbuzz, Skype, Viber, WeChat and Yahoo are all available for iOS, Android, Blackberry and Windows Phone. ooVoo and Tango are available for iOS and Android, and AOL and Trillian are available for iOS, Android and Blackberry.

¹⁸ Case COMP/M.6281, decision of 7 October 2011, paragraphs 10-43.

¹⁹ See replies to questionnaire Q1 to competitors of 29 October 2013, question 17 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 16.

²⁰ See replies to questionnaire Q1 to competitors of 29 October 2013, question 16 and replies to Q2 to developers of apps for smart mobile devices, question 15 of 30 October 2013.

for desktops/laptops, pointing out that the functionalities they offer are similar, others indicated that certain communication apps, in particular those supporting video calls, perform better when running on PCs. Other respondents argued that some consumer communication apps are optimised for on-the-go situations in terms of functionalities and quality, but the basic functions and intended use remain the same.

- (43) For the reasons set out in its past decision in *Microsoft/Skype*, and in light of the responses to the market investigation in this case, the Commission considers that there are indications that there may be a separate market for consumer communication apps, which could be segmented by platform.
- (44) In addition, regarding a possible segmentation by OS, the Commission observes that currently a number of communication apps supporting instant messaging (IM)²¹, voice calls (VoIP)²² and video calls,²³ as well as other functionalities, are available for downloading on various mobile OSs (Skype, ChatON, Fring, Facebook, ooVoo, Google Hangouts, Nimbuzz, Tango, Yahoo). A limited number of apps remain confined to the OS developer's proprietary OS, such as Apple Facetime. Nevertheless, other consumer apps may be downloaded on iOS, including Google Hangouts, Skype, Yahoo, Tango, Nimbuzz, ooVoo and Fring.
- (45) In any event, however, for the purpose of the assessment of the present transaction, the exact scope of the relevant market for consumer communication apps can be left open, as the proposed transaction does not raise competition concerns under any alternative product market definition considered.

4.1.1.3.2. Productivity apps

4.1.1.3.2.1. View of the Notifying Party

- (46) Microsoft submits that productivity apps used on smart mobile devices (“mobile productivity apps”) cover a wide range of functionalities including: (1) management and processing of documents, content and spreadsheets, (2) sharing of and collaboration on documents, (3) document navigation and search, (4) calendar management and synchronization, and (5) email. The list of functionalities continues to expand, due, in particular, to the fact that mobile users seek to do more on the move – conferencing, document sharing, versioning document synchronization – and often in real time.
- (47) Microsoft also submits that the mobile productivity apps are distinct from productivity apps for desktops and laptops. Originally, productivity apps were PC-based. Mobile productivity apps have been developed more recently, and offer, in general, a lower level of functionality compared to the feature set offered by productivity apps used on desktops and laptops.

21 IM is a form of real-time short text messaging. IM includes presence which is the ability to detect other users' availability (i.e. whether they are online, absent or busy).

22 Voice calls refer to VoIP calls and mean the delivery of voice services over networks based wholly or partly on Internet protocol. VoIP calls differ technically from PSTN calls.

23 Video calls enable users from at least two or more locations to interact using two-way synchronized video and voice transmissions. To allow video calls, a device requires webcam and microphone functionality.

(48) Microsoft further claims that the market for mobile productivity apps should not be segmented according to functionality, as most of these apps provide users some or all of the traditional productivity functionalities. Moreover, from the user's point of view, further segmentation by functionality would not reflect the nature of the demand or the way mobile productivity apps are used.

4.1.1.3.2.2. *Previous Commission decisions, results of the market investigation and Commission's assessment*

(49) In *Oracle/PeopleSoft*,²⁴ the Commission noted that the market for business software applications can be generally be divided into (i) personal productivity applications (such as word processing, spread sheets and client-side collaborative applications); and (ii) enterprise application software. However, the Commission's analysis in that case focussed on the enterprise application software market and the personal productivity applications market was not further discussed.

(50) The large majority of respondents to the market investigation in this case provided indications that, due to their different characteristics and intended use (generally for business use), mobile productivity apps are distinct from other types of apps for smart mobile devices.²⁵ Other differences pointed out by the respondents were that mobile productivity apps require synchronisation with other material produced by the user. Moreover, suppliers (app developers) of mobile productivity apps are often specialised in the development of this specific type of apps and customers for mobile productivity apps typically do not consider them substitutable with apps offering different functionalities. Some market players also pointed out that the price of mobile productivity apps tends to be higher than for other smart mobile apps.

(51) The large majority of respondents to the market investigation also indicated that mobile productivity apps are not comparable to productivity apps for PCs (desktop and laptops),²⁶ as the former, at least at present, have fewer features, provide less functionality and are less user-friendly than the latter. In terms of functionality, this is particularly relevant for spread sheets and presentations. As underlined by several respondents, from the supply-side perspective, productivity apps for PCs are written for different hardware environments: developers write fully-featured productivity apps specifically for desktops and laptops to take advantage of their faster processors, larger screens and also of the presence of a mouse and physical keyboard. From the demand point of view, typically, users use their smart mobile devices mainly to read and check items or make small edits, and not for heavy and productive work over extended periods of time (like writing long documents, draft reports etc.).

(52) The data gathered during the market investigation further indicated that there are differences between the core functionalities of mobile productivity apps for consumer and corporate users. In the case of consumer users, these functionalities are often more limited

24 Case COMP/M. 3216, decision of 26 October 2004, paragraphs 15.

25 See replies to questionnaire Q1 to competitors of 29 October 2013, question 13 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 12.

26 See replies to questionnaire Q1 to competitors of 29 October 2013, question 12 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 11.

(for example, email and calendar synchronisation),²⁷ while, in the case of corporate users, these functionalities generally include task management features, document and spreadsheet processing, PDF reading, collaboration and presentation tools.²⁸

- (53) Data gathered from the market investigation also indicated that mobile productivity apps for corporate users are different as compared to those for consumer users,²⁹ because they require different characteristics or customisations to achieve the types of functionalities required in a business environment, including, on average, better security management and identity authentication features. A corporate user also requires apps that have a larger range of features, such as the ability to edit large documents and spreadsheets.
- (54) Finally, the market investigation provided inconclusive results³⁰ as to whether the same mobile productivity apps are available across different mobile OSs. While a number of mobile productivity apps are available on different OSs, this is not the case for all such apps.
- (55) For the reasons set out in paragraphs (50) and (51) above, the Commission considers that mobile productivity apps constitute a separate relevant product market from other types of apps for smart mobile devices and a separate relevant product market from productivity apps for desktops and laptops.
- (56) The Commission also considers that while mobile productivity apps for corporate users may constitute a separate product market, for the purposes of the assessment of the present transaction this question can be left open as the proposed transaction does not raise competition concerns under any alternative product market definition considered. Equally, the Commission considers that, for the purpose of the assessment of the present transaction, the question whether the market for mobile product activity apps should be further segmented by functionality and/or OS can be left open as the proposed transaction does not raise competition concerns under any alternative product market definition considered.

4.1.1.4. Mail server software and services

- (57) Smart mobile devices, mobile OSs and apps are vertically related to mail server software and services to the extent that the former make use of the latter. Mail server software and services include a range of communications services, such as email, calendar, contact, and task management, as well as other services, such as archiving and voicemail handling, to computing devices such as smartphones, tablets and PCs ("clients").

4.1.1.4.1. View of the Notifying Party

- (58) Microsoft submits that, from the perspective of an average corporate user, enterprise mail server software and services are a distinct relevant product market from consumer

²⁷ See replies to questionnaire Q1 to competitors of 29 October 2013, question 37 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 26.

²⁸ See replies to questionnaire Q1 to competitors of 29 October 2013, question 37 and 38 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, questions 26 and 27.

²⁹ See replies to questionnaire Q1 to competitors of 29 October 2013, question 14 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 13.

³⁰ See replies to questionnaire Q1 to competitors of 29 October 2013, question 15 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 14.

email services (although there may be exceptions relating to particularly small businesses that do not need the features of an enterprise-class mail server or service). Different characteristics and functionalities of enterprise mail solutions include enhanced security protections, advanced and customizable administrative controls (such as user account management), sophisticated domain and alias controls, group policy management, and in many cases, the ability to actively manage and remotely wipe-connected smart mobile devices (particularly in the event that such a device is stolen or lost).

- (59) Moreover, Microsoft submits that there is a single relevant product market for enterprise mail server software and services that includes the following three segments: (1) on-premise enterprise mail servers; (2) infrastructure-as-a-service ("IaaS")³¹; and (3) software-as-a-service ("SaaS")³². Microsoft submits that enterprise mail servers were historically deployed "on-premise" (in an enterprise's data centre or server room). Increasingly, they are being offered as "hosted" solutions through IaaS or SaaS.
- (60) According to Microsoft, on-premise mail server software, IaaS and SaaS are all part of the same market. For one, from a demand side perspective, adoption of IaaS and SaaS solutions is growing across all businesses (including large businesses). According to Microsoft's data, large business' adoption of Microsoft's hosted solution, in France, Germany and the UK, increased from [...] % of its enterprise mail server accounts in the first half of 2012 to [...] % in the first half of 2013. Second, from a supply side perspective, Microsoft submits that competition from hosted solutions has led providers of on-premise mail server software to reduce royalties and/or to increase functionality to users without commensurate royalty increases.
- (61) With respect to communication protocols, Microsoft submits that these are part of the relevant market for mail server software and services as there is no demand for them separate from the demand for mail server software and services. Conceptually, communication protocols link mobile apps, mobile OSs and smart mobile devices to the upstream relevant product market for mail servers and services. Communication protocols allow the synchronisation of email, calendar, contact, and/or task management. Users can access, retrieve and modify that data with any compatible client application regardless of OS or smart mobile device. Any changes are stored on the central mail server and synchronised across the variety of client applications available to the user.
- (62) Microsoft's mail server solution, Microsoft Exchange Server, supports a number of industry standard communication protocols for synchronising information with clients. Internet Message Access Protocol v.4 ("IMAP") and Post Office Protocol v.3 ("POP3") are used by an email client to download emails from a mail server. The Simple Mail Transfer Protocol ("SMTP") is used by an email client or an email server to deliver emails. Microsoft's proprietary EAS protocol, in addition to sending and receiving emails, allows for the synchronisation of calendar, contacts, tasks, remote wiping of a smart mobile device and a variety of other security focused features (like remote disabling of smartphone functions). Microsoft's proprietary Exchange Web Services protocol ("EWS") is primarily designed for use with "full-featured" email clients, not mobile email clients.

31 IaaS is a provision model in which an organisation outsources the equipment used to support operations, including storage, hardware, servers and networking components. The service provider owns the equipment and is responsible for housing, running and maintaining it.

32 SaaS is a software distribution model in which applications are hosted by a vendor or service provider and made available to customers over a network, typically the Internet.

4.1.1.4.2. Previous Commission decisions, results of the market investigation and Commission's assessment

- (63) The Commission has not considered the market for mail server software and services and its possible segmentation in any merger decision.
- (64) The vast majority of respondents to the market investigation in this case considered that enterprise mail server software and services are distinct from consumer email software and services.³³ Consumer-focused products generally have less functionality and cost less. Enterprise mail server solutions provide, in particular, enhanced security protection, risk management (business continuity, mobile device management including remote wipe function, device quarantining), compliance measures, (eDiscovery, retention policy enforcement) and customisation/ integration with other corporate services and infrastructure.
- (65) As to a possible segmentation of enterprise mail server software and services, the data gathered during the market investigation was inconclusive as to whether IaaS solutions are comparable to on-premise enterprise mail server software.³⁴ Potential security and confidentiality concerns were put forward as reasons that larger corporate users do not perceive IaaS as an appropriate substitute. A number of respondents considered that functionality and availability of service is comparable between on-premise solutions and IaaS, with IaaS potentially having a lower total cost of ownership (in particular for small and medium-sized organisations). However, several respondents pointed out that customers may not perceive hosted solutions as sufficiently secure (with respect to third party access to confidential information/business secrets) given the lack of direct control over the servers. Moreover, IaaS would not generally allow the same level of integration into the corporate network.
- (66) As regards SaaS (or "cloud") mail services, a majority of respondents to the market investigation did not perceive SaaS as meeting, at present, corporate needs (such as regarding security and confidentiality of data, compliance, and integration with corporate network infrastructure) in a way that makes them substitutable with on-premise Enterprise services.³⁵ On the other hand, one smart mobile device manufacturer considered that *"SaaS mail services typically have a smaller set of advanced features and can be positioned in between consumer email services and enterprise-class email server software in terms of capability"*, and notes that organisations that do not need the full set of sophisticated capabilities may well regard them as a sufficient substitute.³⁶ A number of the respondents that shared this view in principle considered, however,

33 See replies to questionnaire Q1 to competitors of 29 October 2013, question 18, replies to questionnaire Q3 to Microsoft Exchange Server and Exchange ActiveSync Competitors of 30 October 2013, question 5, and replies to questionnaire Q4 to Microsoft Exchange Server Customers of 30 October 2013, question 5.

34 See replies to questionnaire Q1 to competitors of 29 October 2013, question 19, replies to questionnaire Q3 to Microsoft Exchange Server and Exchange ActiveSync Competitors of 30 October 2013, question 6, and replies to questionnaire Q4 to Microsoft Exchange Server Customers of 30 October 2013, question 6.

35 See replies to questionnaire Q1 to competitors of 29 October 2013, question 20, replies to questionnaire Q3 to Microsoft Exchange Server and Exchange ActiveSync Competitors of 30 October 2013, question 7, and replies to questionnaire Q4 to Microsoft Exchange Server Customers of 30 October 2013, question 7.

36 See reply by Blackberry to questionnaire Q1 to competitors of 29 October 2013, question 20.

however, that substitutability ultimately depends on the precise services offered by a SaaS provider.

(67) For the reasons set out in paragraph (64) above, the Commission considers that enterprise mail server software and services constitute a separate product market from consumer mail server software and services.

(68) As to a possible segmentation of the market for enterprise mail server software and services, this can be left open in the case at hand, as the proposed transaction does not raise competition concerns under any alternative product market definition considered.

4.1.2. Relevant geographic markets

4.1.2.1. Smart mobile devices (smartphones and tablets)

4.1.2.1.1. View of the Notifying Party

(69) Microsoft submits that the market for smart mobile devices and its possible sub-segments at least EEA-wide, if not worldwide, is in scope. In support of this, Microsoft notes that smart mobile devices are manufactured on a global scale and shipped worldwide with low transportation costs. The same devices are marketed at similar price levels throughout the world.

4.1.2.1.2. Previous Commission decisions, results of the market investigation and Commission's assessment

(70) In previous Commission decisions, the Commission considered that the relevant geographic market for smart mobile devices was at least EEA-wide, if not worldwide, in scope.³⁷

(71) In the present case, the vast majority of respondents to the market investigation considered that the sale of smartphones and tablets takes place at a worldwide level, as device manufacturers distribute essentially the same devices both in terms of hardware characteristics and of software technologies to all their customers regardless of their geographical location.³⁸ There are no major price differences between countries and transportation costs are low, allowing globally manufactured products to be shipped worldwide. Respondents also considered that existing regional differences in cellular standards are not a barrier as most devices support multiple bands within the same cellular standard and even operate on multiple cellular standards in order to facilitate consumer roaming. Similarly, most of the respondents to the market investigation do not specifically mention IP rights as barrier to the worldwide trade of these products.

(72) The Commission considers that while the geographic scope of the relevant market may be at least EEA-wide, if not worldwide, this question can be left open as the proposed transaction does not raise competition concerns under any alternative geographic market definition considered.

³⁷ Case COMP/M.6381 *Google / Motorola Mobility*, Commission decision of 13 February 2012, paragraphs 43 to 47; and Case COMP/M.4942 *Nokia / Navteq*, Commission decision of 2 July 2008, paragraph 140.

³⁸ See replies to questionnaire Q1 to competitors of 29 October 2013, questions 21 and 22.

4.1.2.2. OSs for smart mobile devices

4.1.2.2.1. View of the Notifying Party

(73) Microsoft submits that the relevant geographic market for OSs for smart mobile devices is at least EEA-wide, if not worldwide, in scope. In support of this Microsoft notes that the objective conditions for competition are essentially the same worldwide, that OEMs generally enter into a single worldwide licensing agreement with the OS provider, and that import restrictions, transport costs and technical requirements do not represent significant limitations. Microsoft submits that, while there are certain language-specific demand characteristics related to mobile OSs, these do not constitute a significant obstacle to cross-border supplies.

4.1.2.2.2. Previous Commission decisions, results of the market investigation and Commission's assessment

(74) In the *Google/Motorola* decision,³⁹ the Commission found that the relevant geographic market for OSs for smart mobile devices was at least EEA-wide, if not worldwide, in scope.

(75) The data gathered during the market investigation supports the existence of worldwide markets for mobile OSs (and the possible relevant segments). Notably, the market investigation indicated that there are no meaningful differences between OSs in different parts of the world and that manufacturers of smart mobile devices typically conclude worldwide licensing agreements with mobile OS providers.

(76) The Commission considers that while the geographic scope of the relevant market for OSs for smart mobile devices may be at least EEA-wide, if not worldwide, this question can be left open as the proposed transaction does not raise competition concerns under any alternative geographic market definition considered.

4.1.2.3. Consumer communication services and mobile productivity apps

4.1.2.3.1. View of the Notifying Party

(77) Microsoft submits that the markets for consumer communication services and for mobile productivity apps are both at least EEA-wide, if not worldwide, in scope. Competitive conditions are essentially the same all over the world; apps and service developers distribute the same products to all their customers regardless of their geographic location; and prices are similar for the same products offered globally. Moreover, while there are certain language-specific demand characteristics, these do not constitute a significant obstacle to cross-border supplies.

4.1.2.3.2. Previous Commission decisions, results of the market investigation and Commission's assessment

(78) In its *Microsoft/Skype*⁴⁰ decision, the Commission considered that the market for consumer communication services was at least EEA-wide, but ultimately left open the exact scope of the geographic market.

³⁹ Case COMP/M.6381 *Google / Motorola Mobility*, Commission decision of 13 February 2012, paragraphs 31 to 36.

⁴⁰ Case COMP/M.6281 - *Microsoft/ Skype*, Commission Decision of 7 October 2011, paragraphs 64 to 68.

- (79) By contrast, the Commission has not previously considered the market for productivity apps and its possible segmentation.
- (80) The market investigation supports the existence of worldwide markets for consumer communication services and for mobile productivity apps (and their possible relevant sub-segments), albeit that a limited number of respondents pointed out that, while apps are offered on the global market, the demand for such services and apps may vary depending on divergent cultural interests or language.
- (81) The Commission considers that while the geographic scope of the relevant markets for consumer communication services and for mobile productivity apps may be at least EEA-wide, if not worldwide, this question can be left open as the proposed transaction does not raise competition concerns under any alternative geographic market definition considered.

4.1.2.4. Enterprise mail server software and services

4.1.2.4.1. View of the Notifying Party

- (82) Microsoft submits that the market for enterprise mail server software and services is at least EEA-wide, if not worldwide in scope. Microsoft argues that email software services interoperate with email client and mobile software the same way globally and the scope of the relevant licences and related agreements is also global.

4.1.2.4.2. Previous Commission decisions, results of the market investigation and Commission's assessment

- (83) Previous merger decisions by the Commission have not considered the market for enterprise mail server software and services and its possible segmentation.
- (84) The vast majority of respondents to the market investigation considered that the main providers of enterprise mail solutions operate on a global basis and mail server software and functionalities, quality or price do not differ substantially across regions. Licensing mail enterprise server software also takes place on a worldwide scale.⁴¹
- (85) The Commission considers that while the geographic scope of the relevant market for enterprise mail server software and services may be at least EEA-wide, if not worldwide, this question can be left open as the proposed transaction does not raise competition concerns under any alternative geographic market definition considered.

4.2. **Competitive assessment**

- (86) There are a number of limited horizontal overlaps between the activities of the Parties on certain of the possible relevant markets in the manufacturing and supply of smart mobile devices.
- (87) There are also non-horizontal links between the Parties, in particular, between: (1) Microsoft's activities in the developing and licensing of OSs for smart mobile devices and the activities of the D&S Business relating to smart mobile devices; (2) Microsoft's

41 See replies to questionnaire Q1 to competitors of 29 October 2013, question 25, replies to questionnaire Q3 to Microsoft Exchange Server and Exchange ActiveSync Competitors of 30 October 2013, question 8, and replies to questionnaire Q4 to Microsoft Exchange Server Customers of 30 October 2013, question 10.

activities in the developing and licensing of apps for smart mobile devices and the activities of the D&S Business relating to smart mobile devices; (3) Microsoft's activities in the developing and licensing of mail server communication protocols enabling interoperability between Microsoft's mail server software and the activities of the D&S Business in relation to smart mobile devices.

4.2.1. Assessment of horizontal overlaps

- (88) The proposed transaction results in a horizontal overlap between the Parties' activities on a possible market comprising the development, manufacturing and sale of both smartphones and tablets. However, even on such a market, the proposed transaction would not give rise to any affected markets, as the Parties' combined share in 2012 did not exceed 15% at both EEA and worldwide level.
- (89) The proposed transaction also results in a horizontal overlap between the Parties' activities on a possible market for tablets. Microsoft supplies the "Surface" tablet, while Nokia announced in October 2013 the release of its first tablet, named "Lumia 2520", which is supposed to be shipped before the end of 2013 (and will form part of the D&S Business). However, in light of Microsoft's limited share in this segment ([0-5]% at both EEA and worldwide level), and the uncertainty as to the future success of the D&S Business' product, the proposed transaction does not give rise to competition concerns in this possible market segment.
- (90) Respondents to the market investigation have not expressed any concerns as regards a possible significant impediment to effective competition arising from horizontal overlaps between the activities of the Parties.
- (91) In light of the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as a result of horizontal overlaps between the activities of the Parties.

4.2.2. Assessment of non-horizontal links

- (92) The Commission has investigated three possible ways in which the transaction may give rise to serious doubts due to the non-horizontal links between the activities of the Parties. They relate to Microsoft's possible ability and incentive to foreclose competing providers of smart mobile devices (also referred to as Original Equipment Manufacturers, or "OEMs") by restricting access to: (1) its mobile OS, (2) its apps and (3) its licenses to patents of communication protocols enabling interoperability between Microsoft's mail server software and competing smart mobile devices.⁴²
- (93) According to the Non-Horizontal Merger Guidelines, in order to be able to foreclose competitors, the vertically integrating firm must have a significant degree of

⁴² For the sake of completeness, it is noted that vertical customer foreclosure theories resulting from the proposed transaction (concerning the possible inability for third party OS suppliers and app developers to access the D&S' smart mobile devices) can be ruled out because: (1) the D&S' smart mobile devices already exclusively use Microsoft's OS and hence the proposed transaction does not result in a restriction of access by third party OS suppliers to these devices; and (2) the limited market share of the D&S Business' devices (less than 5% in both smartphones and tablets: [0-5]% at worldwide and [0-5]% at EEA-level respectively, but also in smartphones only: [0-5]% worldwide and [0-5]% at EEA-level).

market power in the upstream market.⁴³ Furthermore, if there remains sufficient credible downstream competitors whose costs are not likely to be raised, for example because they are themselves vertically integrated or they are capable of switching to adequate alternative inputs, competition from those firms may constitute a sufficient constraint on the merged entity and therefore prevent output prices from rising above pre-merger levels.⁴⁴ Competition concerns in non-horizontal mergers are therefore unlikely to arise where the market share post-transaction of the new entity in each of the markets concerned is below 30%.⁴⁵

- (94) For completeness, the Commission has also investigated whether, as claimed by certain respondents to the market investigation, the proposed transaction will strengthen the merged entity's upstream position with respect to its patent portfolio for smart mobile devices. The Commission considers that this is not the case. Under the proposed transaction, Microsoft acquires only non-SEPs that read on the devices being produced by the D&S Business. According to Nokia, these patents are mostly design patents (so called "look and feel" patents) and [information concerning pre-concentration licensing of these patents]. Apart from these non-SEPs, there is no increase in Microsoft's patent portfolio. On the contrary, Microsoft's exposure to third party IP rights is likely to increase post-transaction because, once the existing licensing agreements that Nokia has entered into with third-parties relating to the D&S Business expire, Microsoft will need to renew these agreements, without, however, being able to cross-license the SEPs which Nokia typically offered to cross-license as part of the negotiation and which Nokia will retain post-transaction. For these reasons, the possibility that the proposed transaction strengthens the merged entity's upstream position with respect to its non-SEP portfolio for smart mobile devices can be discarded.

4.2.2.1. Input foreclosure by restricting the supply of Microsoft's Windows OSs for smart mobile devices

- (95) Post transaction, Microsoft will become a vertically integrated producer of smart mobile devices. The Commission has therefore assessed whether the transaction raises serious doubts as to its compatibility with the common market due to the fact that the merged entity may have the ability and incentive to foreclose or degrade the access of other smart mobile device manufacturers to its Windows OSs, notably Windows Phone, Windows RT and Windows 8.
- (96) In undertaking such an assessment, the Commission has examined whether, post-transaction: (i) the merged entity would have the ability to substantially foreclose access; (ii) the merged entity would have the incentive to do so; and whether (iii) a foreclosure strategy would have effects downstream.⁴⁶ These aspects are usually analysed together.⁴⁷

43 See Non-Horizontal Merger Guidelines, paragraph 35.

44 See Non-Horizontal Merger Guidelines, paragraph 50.

45 See Non-horizontal merger guidelines, paragraph 25.

46 See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, p. 11, paragraph 32.

47 See Non-Horizontal Merger Guidelines, paragraph 32.

4.2.2.1.1. View of the Notifying Party

- (97) With regard to its ability to foreclose access to its Windows OSs, Microsoft submits that, in 2012, its share of the market for mobile OSs for smart mobile devices was no more than [0-5]% in the EEA and no more than [0-5]% worldwide (regardless of whether OSs for smartphones and tablets are viewed as part of the same market or separately). Android and iOS represented respectively 71% and 19%, of worldwide share of supply of OSs to smartphones (respectively 67% and 21% in the EEA.), with Blackberry and Linux having respectively shares of 5% and 2% on a worldwide smartphone OS market.
- (98) With regard to its incentive to refuse to supply or to degrade the quality of its Windows OSs, Microsoft submits that the smart mobile device business model depends upon the mobile apps of developers who are ultimately attracted to the mobile OSs with the largest user base. The majority of Windows OS devices sold today are made by OEMs. If Microsoft refused to supply, or degraded the performance of, its mobile OSs to competing smart mobile device manufacturers, it would hamper the growth of its user base. This would in turn discourage the development of mobile apps for its OSs, and ultimately weaken the competitiveness of its offering.
- (99) With regard to the effect on competition of Microsoft's conduct, Microsoft notes that the market share of third party devices running Microsoft's mobile OSs in the downstream market for smart mobile devices was no more than [0-5]% both in the EEA and worldwide in 2012 (regardless of whether smartphones and tablets are viewed as part of the same market or separately).

4.2.2.1.2. Results of the market investigation and the Commission's assessment

- (100) A limited number of respondents to the market investigation submit that Microsoft may have the incentive to stop licensing, or license inferior versions of its mobile OSs and to favour its own downstream business.⁴⁸
- (101) The Commission disagrees, however, for the following reasons.
- (102) First, the Commission notes that the merged entity will not have the required market power to engage in any foreclosure strategy. Microsoft's 2012 share of supply of OSs for smart mobile devices, for smartphones and for tablets was less than [0-5]% both in the EEA and worldwide. Even in a possible market segment that excludes mobile OSs that are not licensed to OEMs, where Android was in 2012 by far the dominant OS with upwards of 80-90% of the market, depending on the segment, Microsoft's market 2012 share did not exceed [5-10]%. On such a market, Android was by far the dominant OS, with a 2012 share of more than 80-90% of the market. In addition, there appear to be several new entrants in the relevant market for OSs (whose products are available to third party OEMs), including Firefox OS and Sailfish OS.
- (103) Second, the Commission considers that the merged entity will not have the incentive to engage in any foreclosure conduct as post-transaction (as was already the case pre-transaction), Microsoft will have the incentive to license its Windows OSs as broadly as possible to increase its user share with both OEMs and app developers. For Microsoft to credibly compete with iOS and Android, it will need to both increase the number of apps available for its mobile OS and ensure broad consumer adoption of Windows OS devices. In addition, in 2012, Microsoft's own tablets running Windows OS represented only a [20-

48 See replies to questionnaire Q1 to competitors of 29 October 2013, question 32.

30]% share worldwide, and a [5-10]% share in the EEA of all the Windows OS tablets sold. Microsoft is therefore likely to continue to compete for the business of third-party OEMs rather than cede it to Android.

- (104) In that regard, the majority of respondents to the market investigation, including a number of OEMs currently licensing Microsoft's mobile OSs, considered that such a strategy would not make business sense for Microsoft.⁴⁹ Moreover, the majority of respondents to the market investigation confirmed that a mobile OS is an important element of the commercial and technical success of a smart mobile device⁵⁰ and that consumer preferences for a smart mobile device depend on the attractiveness of the mobile platform as a whole, of which the OS is just one part. In particular, respondents indicated that the quality and breadth of available mobile apps carry a greater weight.⁵¹ This, in turn, is driven by the mobile OS developer's support of mobile app developers and the size of the mobile OSs' user base.
- (105) Third, the Commission considers that, even if Microsoft were to put in place such a strategy, it would not lead to the foreclosure of the merged entity's competitors due to: (i) the limited market share of third party devices running Microsoft's mobile OSs in the downstream market for smart mobile devices; (ii) the fact that the majority of respondents to the market investigation have indicated that, at present, the Windows mobile OS does not have significant advantages as compared to other mobile OSs;⁵² and (iii) the ability of licensees of Microsoft's OSs to easily switch to competing OS providers, such as Android. Indeed, all OEMs other than Nokia that responded to the market investigation and currently license Windows Phone OS also develop and supply smart mobile devices using other mobile OSs.⁵³ Accordingly, if Microsoft were to stop licensing, or start licensing only inferior versions of, its mobile OSs, these OEMs could switch to the other mobile OSs they already use.
- (106) Finally, the Commission notes that, from a consumer perspective, the development of a third platform in the mobile space in addition to iOS and Android would be pro-competitive as it would result in greater choice for end-users.
- (107) Based on the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the common market as the merged entity will not have the ability and incentive to foreclose or degrading the access of other smart mobile device manufacturers to its mobile OSs.

49 See replies to questionnaire Q1 to competitors of 29 October 2013, question 32.

50 See replies to questionnaire Q1 to competitors of 29 October 2013, question 26 and 29.

51 See replies to questionnaire Q1 to competitors of 29 October 2013, question 28.

52 See replies to questionnaire Q1 to competitors of 29 October 2013, questions 34-36. For the sake of completeness, the Commission also notes that the proposed transaction does not confer any competitive advantage on hardware suppliers using Microsoft's Windows OSs over suppliers using competing mobile OSs. Microsoft has confirmed that third party hardware suppliers using its Windows OSs, which need to use Nokia's patented inventions (as all other hardware suppliers, which need to use such inventions) would typically need to [information concerning licensing requirements regarding Nokia's SEPs].

53 See replies to questionnaire Q1 to competitors of 29 October 2013, question 33.

4.2.2.2. Input foreclosure by restricting the supply of Skype and/or Office Mobile apps

(108) Microsoft supplies several mobile apps including Skype and Office for smart mobile devices. The Commission has therefore assessed whether the transaction raises serious doubts as to its compatibility with the common market due to the fact that the merged entity may have the ability and incentive to foreclose or degrade access of other smart mobile device manufacturers to these mobile apps.

4.2.2.2.1. Skype

(109) Skype is a consumer communication service⁵⁴ which enables IM, voice and video communications, as well as other functionalities such as PSTN calls, audio and videoconferencing.

4.2.2.2.1.1. *View of the Notifying Party*

(110) Microsoft submits that Skype is not a "must have" mobile app. First, Microsoft estimates that Skype's share by mobile OS in all consumer communication services (including all functionalities), measured as a proxy by downloads from the relevant mobile app stores between August and October 2013, is [10-20]% for Android and [10-20]% for iOS (calculated as the proportion of total downloads of the top 25 consumer communications apps). As to possible segments of the market for mobile communication apps, Microsoft estimates that Skype has a [30-40]% world-wide market share on the possible segment for video calling mobile apps, [10-20]% for VoIP call apps and [0-5]% for IM mobile apps.

(111) Second, Microsoft argues that there are a number of other providers of mobile communication apps that offer the same functionalities as Skype. These include Google Hangouts, Yahoo!, Fring, Apple Facetime (on iOS devices) and ooVoo. In 2012, Apple's Facetime (available only on iOS) had a [20-30]% market share in video calls (only available on iOS), followed by Google Hangouts ([5-10]%), WeChat ([5-10]%), Tango ([5-10]%) and ooVoo ([0-5]%). As regards Instant Messaging (IM) Skype's 2012 share was [0-5]% (across all OSs). Microsoft estimates that Whatsapp's 2012 share was [20-30]%, followed by KakaoTalk ([10-20]%) and iMessage ([5-10]%). In terms of VoIP calls, Skype's 2012 share was [10-20]% across all OSs, approximately half of Viber's [20-30]% market share in this segment.

(112) Third, Microsoft submits that there is no switching cost for consumers when it comes to mobile communication apps, since the vast majority are free-of-charge. Microsoft notes also that there has been significant entry in the mobile consumer communications market in recent years.⁵⁵

(113) Fourth, Microsoft submits that the merged entity would not have the incentive to refuse to supply, or to degrade the performance of Skype, to competing smart mobile device manufacturers. Given that Skype relies on interoperability and network effects for its success, such foreclosure strategy would hamper the growth of Skype's user base and ultimately weaken its competitive offering. Users would quickly switch to competing mobile communication apps. Furthermore, Skype has been available on a cross-platform

⁵⁴ Windows Messenger has been discontinued since April 2013 and replaced by Skype.

⁵⁵ Entrants include Viber, ooVoo, Bistri, IMO, Friendcaller, Pattalk, VZOchat, Google Hangouts, Facebook, Mail.Ru, AOL, Fring, Trillian, Nimbuzz, Tango, ICQ and Miranda.

basis for several years, and Microsoft would have no incentive to lose users who have been using Skype across multiple devices.

4.2.2.2.1.2. Results of the market investigation and the Commission's assessment

- (114) As Microsoft will produce its own smart mobile devices post-transaction, a limited number of market players expressed concerns that Microsoft may have higher incentives to restrict the supply of Skype to rival smart mobile device manufacturers or mobile OS suppliers. They submit that Skype is a "must-have" application and restricting access to Skype for users of handsets running other mobile OSs would incentivise consumers to purchase the merged entity's smartphones and tablets.
- (115) The Commission disagrees, however, for the following reasons.
- (116) First, the Commission does not consider that Microsoft, via Skype, holds the necessary degree of market power to engage in any foreclosure conduct as Skype's market share on the market for mobile consumer communication apps providing video call functionalities across all OSs is only [30-40]%. Based on available information, the Commission also considers that Skype's market share would not materially differ even if a possible market were to be segmented by OS. In all other possible relevant market segments, Skype's share is below [30-40]%.⁵⁶
- (117) The information gathered during the market investigation also indicated that a number of other mobile communication apps closely compete on this market. Respondents to the market investigation indicated as main competitors to Skype, Apple Facetime and iMessage (available only on iOS), Google Hangouts, Yahoo, Fring and WeChat (all available across OSs).⁵⁶ Only a few respondents considered Skype as a "must have" consumer app, and mentioned it together with other mobile communication apps, such as Apple Facetime (available only on iOS), Blackberry Messenger (available on only Blackberry OS), Facebook, Google Chat, Lync, WhatsApp, Twitter and WeChat (all available across on OSs). Regarding the possible segment for corporate users, Skype, together with BlackBerry Messenger and WhatsApp, was mentioned by even fewer respondents as a "must have" mobile communication app.⁵⁷
- (118) Skype therefore does not appear to be a "must have" mobile communication app. Moreover, recent entrants on the market have managed to attract an important number of users in a short time. For instance, Viber by Viber Media was launched in December 2010. In 2012, it already had a market share of approximately [20-30]% in the mobile VoIP calls segment. In May 2013 Viber announced that it had already reached 200 million users. According to Microsoft, Skype has 300 million active users.
- (119) Second, the Commission considers that Microsoft will not have the incentive to engage in the foreclosure conduct described in paragraph (114) above.
- (120) This is confirmed by a majority of respondents to the market investigation which consider that, while Microsoft's future strategy with regard to Skype could be difficult to

⁵⁶ See replies to questionnaire Q1 to competitors of 29 October 2013, question 42 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 31.

⁵⁷ See replies to questionnaire Q1 to competitors of 29 October 2013, question 41 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 30.

predict, it would not make business sense for Microsoft to stop licensing Skype to rival device and/or mobile OS suppliers⁵⁸. The main reasons given by respondents included the need for Skype to achieve growth, and the fact that removing support for Skype would diminish the value of the mobile app and would hamper the development of a competitive Windows platform for smart mobile devices. If anything, such strategy would entice users to switch to competing communication apps.

(121) Given that the market share of the Windows OS for smartphones is less than [5-10]%, the market share for the OS for tablets is less than [0-5]%, and that Skype's client base depends on its inter-operability with different OSs, the merged entity will not engage in such a hypothetical foreclosure strategy as it would hamper the growth of Skype's user base, and ultimately weaken the competitiveness of Skype's offerings.

(122) Indeed, the majority of respondents to the market investigation also noted that users would switch to different communication apps rather than acquire a new smart mobile device running a Windows OS.⁵⁹ Different communication apps are usually free of charge or inexpensive and multiple mobile communications apps can be installed on the same device. Switching should not take a significant amount of time, as the contact data that mobile communications apps rely on is frequently stored either on the smart mobile device itself, or a server or service that is accessible through the APIs of the mobile OS, or may be manually exported.

(123) Third, in light of the non "must-have" nature of Skype as confirmed by the market investigation, as well as the ability of consumers to switch to competing mobile communication apps, the Commission considers that any such possible foreclosure conduct, even if implemented, would not give rise to a significant impediment to effective competition.

(124) Based on the above, the Commission concludes that the proposed transaction will not give rise to serious doubts as to its compatibility with the common market due to the fact that the merged entity may have the ability and incentive to foreclose or degrade access of other smart mobile device manufacturers to these mobile apps.

4.2.2.2.2. Office suite for smart mobile devices

(125) The Office suite for smart phone devices includes Word, Excel and PowerPoint and offers users the possibility to share and store documents. On smartphones running Windows Phone OS, iOS and Android, the Office suite is known as Office Mobile. The Office suite⁶⁰ is also available on tablets running Windows 8, Windows 8.1 OS, Windows RT OS and the newly launched Nokia Lumia tablet. It is not, however, currently available on tablets running iOS or Android.

(126) View of the Notifying Party

58 See replies to questionnaire Q1 to competitors of 29 October 2013, question 45 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 34.

59 See replies to questionnaire Q1 to competitors of 29 October 2013, question 44 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 33.

60 See for instance Office Home&Student 2013 RT. As tablets have special needs for security and mobility, a few features are unavailable in Office 2013 RT applications, including macros, add-ins, and other custom programs written by users or developed by third parties. See <http://office.microsoft.com/en-us/home-and-student/office-2013-rt-faqs-FX103210361.aspx>.

- (127) Microsoft submits, first, that Office Mobile is not a "must have" mobile app for either consumer users or corporate users of smartphones. While it has not provided market shares Microsoft submits that the number of reported activations of Office Mobile on iOS and Android (less than [...] during the first trimester when it was released) suggests that it does not have a significant market share. To put this figure in context, 356 million iPhones had been sold by the end of March 2013⁶¹, which means that less than [0-5]% of iPhone users have installed Office Mobile during the first ten weeks of its availability.
- (128) Second, with regard to Office suite on tablets, Microsoft submits that Office was pre-activated on approximately [...] Windows RT tablets in 2012, and that there were an additional [...] Windows RT tablets sold in 2012 that were manufactured by third parties, for a total of [...] Windows RT tablets sold in 2012 (approximately [...] of the total number of tablets sold by Microsoft in 2012⁶²).
- (129) Third, Microsoft submits that other mobile productivity apps such as Apple Numbers, and Apple Pages (exclusively available on iOS), Docs2Go (available on Android, iOS, Blackberry OS and Windows OS), Quick Office and Good Reader (both available on iOS and Android) are the leading productivity apps for these mobile OSs and for corporate users in particular⁶³. Moreover, Microsoft argues that the "consumerisation" of IT has taken hold in enterprises and, as a result, users increasingly use their devices for both business and private purposes, using apps that are installed/ downloaded and activated for both purposes.
- (130) Fourth, Microsoft submits that, as a result of the dynamic character of mobile app markets, there are a significant number of new entrants. Over the past five years, several players have begun to supply mobile productivity apps.⁶⁴
- (131) As regards incentives, Microsoft submits, first, that the merged entity will have neither the incentive to refuse to supply its Office suite to competing smart mobile device manufacturers, nor to degrade its performance. For example, if Microsoft decides not to supply Office Mobile on competing mobile OSs, users will likely switch to competing mobile productivity apps such as Apple's iWork or Polaris Office, Google Drive, QuickOffice, Documents To Go or CloudOn.⁶⁵ Microsoft also submits that while certain mobile productivity apps are paid-for, prices are not high and do not constitute a barrier to switching to a competing mobile productivity app.

61 See <http://appadvice.com/appnn/2013/07/sales-of-apples-iphone-soon-to-overtake-total-ipod-sales>.

62 For the Windows 8 and Windows 8.1. tablets sold in 2012, Microsoft cannot determine how many had Office suite installed on them, [information concerning installation tracking].

63 As identified in a study by Citrix "Enterprise mobility cloud report" <http://www.electronista.com/articles/13/03/28/study.highlights.differences.in.world.region.use.productivity.apps>.

64 <http://www.pcmag.com/encyclopedia/term/49780/productivity-software>: "There are tons of word processing apps out there. Maybe too many: 69 pop up if you search "word processor" in the App Store, and 240 show up in Google Play."

65 Other productivity apps offerings on the market are: QuickOffice Pro HD, Documents to Go by RIM, Kingsoft Office, Olive Office Premium, Office Suite 7+, Smart Office 2 by Picstel, Android Office by Sibling, and ThinkFree Office by Hancom.

(132) Second, Microsoft notes that Office Mobile is a relatively recent entrant on the smartphone app market. Microsoft submits that it has only recently completed the development of its iOS and Android versions of Office Mobile. It will have every incentive to facilitate the widest possible adoption of its mobile productivity app in order to recuperate its development costs.

(133) Finally, with regard to tablets running Windows OSs, Microsoft submits that there is no difference in the availability of Office suite between Microsoft and third-party devices, both for consumer and commercial uses, and it has no incentive to restrict third party OEMs producing Windows tablets access to Office, [information regarding Windows OS adoption]. Moreover, Microsoft has every incentive to make tablets using Windows OS as attractive as possible to customers choosing between tablets using Android, iOS and Windows, and to incentivise OEMs to manufacture tablets using Windows OS instead of other OS, such as Android. Microsoft also notes that on Windows OS tablets, a number of other productivity apps are available such as Google Docs, Kingsoft Office Suite, Open Office, Suite Office, Zoho and SoftMaker FreeOffice which offer office suites with word, spreadsheet and presentation processors and PDF viewers.

4.2.2.2.1. Results of the market investigation and the Commission's assessment

(134) Concerns were raised during the market investigation regarding Microsoft's possible incentives and ability, post-transaction, to restrict the access of rival device manufacturers and mobile OS suppliers to its Office suite on smart mobile devices in order to position its smart mobile devices as the only devices capable of integrating the Office suite software.

(135) The Commission disagrees, however, for the following reasons.

(136) First, the Commission notes that Microsoft's Office suite for smart mobile devices does not confer upon Microsoft the necessary degree of market power to successfully foreclose competing smart mobile device manufacturers and/or mobile OS vendors.

(137) As regards smartphones, until June 2013, Office Mobile was available only for Windows Phone OS, less than [0-5]% of smartphone users,⁶⁶ and Microsoft has only recently made Office Mobile available for iOS (June 2013) and Android smartphones (July 2013). Consistent with Microsoft's claims, the overall number of activations of Office Mobile reported between June and November 2013 point to a low market share (on iOS smartphones there have been [...] activations of Office Mobile registered for both Android and iOS smartphones).⁶⁷ In comparison, for instance, Google's productivity apps, including Google Drive (formerly known as Google Docs) are used by over 5 million businesses.⁶⁸

(138) Moreover, a majority of respondents to the market investigation did not identify any "must have" mobile productivity apps and, more specifically, did not identify Office Mobile as a "must-have" mobile productivity app for smartphone users.⁶⁹ The non-"must-

⁶⁶ According to data provided by Microsoft, only [20-30]% of Windows Phone users activated one or more of the Office Mobile apps.

⁶⁷ A significant percentage of these [...] installations may not convert to paying customers, as an Office 365 subscription is required to use Office Mobile for Office 365 on Android.

⁶⁸ See <http://www.google.com/enterprise/apps/business/customers.html>.

⁶⁹ See replies to questionnaire Q1 to competitors of 29 October 2013, question 39 and replies to Q2 to developers of apps for smart mobile devices of 30 October 2013, question 28.

have" nature of Office for smartphones is further confirmed by the fact that Office Mobile has so far had a low number of activations on Windows Phone, as well as on iOS and Android smartphones⁷⁰. To put this further in context, IDC estimates that 171.2 million iOS and Android smartphones were purchased in 2012 by employers or employees, which means that Office Mobile is activated on less than [0-5]% of smartphones sold for corporate users.

(139) In addition, the market investigation identified the existence of several other competitors to Office Mobile offering mobile productivity apps, such as Apple Numbers, Apple Pages, Google Drive, Quick Office and Polaris. Some of these apps are pre-installed by the OS or device supplier. These mobile productivity apps typically offer comparable features to Office Mobile including word and spreadsheet processing, presentations, PDF file viewer, collaboration tools and synchronisation. New entrants in 2013 include Quip (available for iPhone, iPads and Android OS), Tempo and Doo⁷¹ (including Android, iOS and OSx versions).

(140) As regards tablets, the Office suite is currently available only on Microsoft's own Surface tablets, on the recently launched Nokia Lumia tablet, and on tablets running Windows OS, which are produced by third party manufacturers.⁷² Office suite on tablets was thus available to less than [0-5]% of tablet users in the first two quarters of 2013 ([0-5]% of tablet users in 2012). The Office suite was pre-activated on approximately [...] Windows tablets sold by third-party tablet manufacturers in 2012.

(141) Second, the Commission considers that Microsoft will not have the incentive to engage in any such foreclosure conduct.

(142) As regards smartphones, Microsoft is a new entrant on the mobile productivity app market with Office Mobile and has recently made it available on iOS and Android smartphones. Several other similar mobile productivity apps exist on the market and if Microsoft were to refuse to make Office Mobile available to competing smart mobile manufacturers, they could pre-install competing mobile apps (to the extent that they pre-install Office Mobile today) and/or users could switch to alternative mobile productivity apps. Given that Office Mobile is not considered a "must-have" mobile productivity app for smartphones, the Commission considers that Microsoft will have the incentive to make Office Mobile as widely available as possible. Moreover, given Nokia's limited presence in the smartphone market segment, the proposed transaction will not increase the merged entity's incentives to stop supplying Office Mobile or to degrade its quality to competing smartphone manufacturers.

(143) The same considerations apply to tablets. In addition, the Commission notes that, pre-transaction, Microsoft Office suite is currently available only on tablets running Microsoft's Windows OSs. In other words, already today, neither Office mobile nor any other version of Office suite is available for tablets running non-Windows OSs. Given Nokia's extremely limited presence in the market segment for tablets, the Commission

70 Microsoft submits that less than [...] users had activated Mobile Office on Windows phone, iOS and Android phones by late August 2013.

71 The updated version of Doo was released in early September and was downloaded over 100 000 times in the first 100 hours of release: <http://www.androidrundown.com/blog/doo-document-scanner-app-version-20-reaches-100000-combined-downloads-100-hours>

72 Asus, Dell, HP, Nokia, Lenovo, Samsung, Toshiba.

considers that the proposed transaction will not materially change the merged entity's incentives with respect to the supply of Office suite to tablet suppliers running non-Windows OSs.

(144) Third, in light of the non-"must-have" nature of Microsoft's Office suite on smartphones and tablets, its low market presence, and the number of alternative apps, the Commission considers that any foreclosure conduct, even if implemented, would not give rise to a significant impediment to effective competition.

(145) Based on the above, the Commission concludes that the proposed transaction will not give rise to serious doubts as to its compatibility with the common market due to the fact that the merged entity may have the ability and incentive to restrict the supply of mobile productivity apps.

4.2.2.3. Input foreclosure through restricting the licensing of Microsoft's Exchange Server communication protocol

(146) Given the significant market share of Microsoft Exchange Server in the upstream market for enterprise mail servers and services, the Commission has assessed whether the transaction raises serious doubts as to its compatibility with the common market due to the fact that the merged entity may have the ability and incentive to foreclose access to its proprietary communication protocol, EAS, in order to increase sales of its own smart mobile devices. The Commission has undertaken its assessment for private consumers of smart mobile devices as well as users of enterprise mail server software and services and corporate smart mobile devices.

4.2.2.3.1. View of the Notifying Party

(147) According to the notifying party, Microsoft Exchange Server has an insignificant market share (close to [0-5]%) among consumer email software and services. However, Microsoft Exchange Server is the leading enterprise messaging and communication server software. Microsoft estimates that its 2013 share on the overall enterprise mail servers and services market to be [50-60]% in the EEA and [30-40]% worldwide.⁷³ Its strongest competitors are Google ([5-10]% in the EEA, [10-20]% worldwide) and IBM/Notes ([0-5]% in the EEA and worldwide).

(148) As regards possible segments, Microsoft estimates its 2013 share for a possible market comprising both on-premises mail server software and IaaS to be [80-90]% in the EEA and [70-80]% worldwide. IBM/Notes would have an estimated share of [0-5]% both at EEA and worldwide level, with open source solutions estimated to have [0-5]% and [0-5]% respectively. Other mail server software would account for [10-20]% and [10-20]% respectively in this segment.⁷⁴ Microsoft is unable to provide data for on-premises and IaaS customers separately and hence does not provide market shares for the possible market for

⁷³ The estimates for the EEA are a proxy based on Microsoft internal data from France, Germany, the UK, the Netherlands, Italy and Poland for the year ending in May 2013. The estimate for its worldwide share is a proxy based on internal data from 11 countries (the United States, the United Kingdom, France, Germany, Canada, Brazil, Russia, India, China, Japan and Australia).

⁷⁴ According to Microsoft, the "other on-premises mail server" services category includes Zimbra (UK, Germany, Italy and Poland), Exim (UK, Germany, France and Poland), MDAemon (UK and Italy), Kerio (Germany and the Netherlands), Dovecot (UK), Icewarp (UK), Tobit (Germany), XS4ALL (the Netherlands).

on-premises mail server software (without IaaS). It submits that it has no reason to believe that its share in this possible market would be materially different when compared to its share of a market comprising both on-premises and IaaS deployment of Exchange Server.

- (149) Microsoft submits that the ability to access email, calendar and contact information through mail servers or services is a core functionality for smart mobile devices. The communication protocols EAS and EWS⁷⁵ allow smart mobile devices to communicate with Microsoft Exchange Server. They are proprietary technologies that are subject to Microsoft's patents. Microsoft, however, submits that it currently licenses EAS to at least [...] smart mobile device suppliers ("OEM device licences")⁷⁶ as well as at least [...] mobile app developers⁷⁷ for use on various platforms and OSs. According to Microsoft, all major smart mobile device manufacturers are currently a licensee apart from Motorola Mobility ("Motorola") due to a patent dispute (see paragraph (157) below), and some smaller (mainly Chinese) smart mobile device manufacturers.
- (150) Microsoft submits that it will not have the ability or incentive to foreclose access to its proprietary communication protocols in order to increase sales of its own smart mobile devices.
- (151) As to its ability to foreclose, Microsoft submits, firstly, that its EAS device licences to smart mobile device manufacturers are effectively licenses for [information regarding duration of licences] EAS patents ([...] out of [...] EAS licences) and cover more than [80-90]% of smartphone units supplied in the EEA in the period 2010 to 2012, and between [60-70]% and [70-80]% of global smartphone supplies (excluding Nokia phones).⁷⁸
- (152) [...] OEM device licences provide that the licence continues [information regarding duration of licences].EAS patents. The licence to [...] continues for as long as [...] continues to pay royalties to renew its licence. Only the licence to [...] – which, however, is not [...] – expires on [...].
- (153) Second, Microsoft submits that all [...] OEM device licences referred to in paragraph (151) above explicitly cover [information concerning application of licences to updated protocol documentation]. If licensees implement an update to the EAS protocol that would entail the use of [information of licence to new EAS patents].
- (154) Third, Microsoft submits that all [...] OEM device licences provide that any licensed device can connect [information concerning versions of Exchange Server]. That is because

⁷⁵ Microsoft submits that Exchange Web Services protocol (EWS) could also feasibly be used to synchronise contact and calendar data but submits that it is more complicated to implement, not optimized for smart mobile devices and is therefore currently implemented by few mobile email clients. In any case, EWS is also owned and licensed by Microsoft and therefore will not serve as a competitive constraint to EAS. The following assessment will therefore disregard EWS.

⁷⁶ Notably [names of licensees].

⁷⁷ While most mobile app developers (such as [...]) have EAS Application licenses, [...] of these companies ([...]) have a broader licence under Microsoft's Interoperability Exchange license agreement that cover patents that read on the Exchange Server protocols, including EAS.

⁷⁸ Based on IDC Worldwide Quarterly Mobile Phone Tracker data, and excluding Nokia's supplies, the aggregate EEA-wide volume market share of supplies covered [...] were [90-100]% in 2010, [80-90]% in 2011, and [80-90]% in 2012. Companies not covered include [...] and others. As to smartphones supplied worldwide, the corresponding figures are [70-80]% in 2010, [70-80]% in 2011, and [60-70]% in 2012.

licenses are granted for use with services provided by [information concerning server software with which EAS OEM licences can be used to establish connectivity].

- (155) Fourth, Microsoft submits that all existing OEM device licences to currently active suppliers (that is, [...]) do not enable Microsoft to terminate the license for any reason other than: [information concerning the two circumstances in which Microsoft has a right to terminate licences].
- (156) Fifth, Microsoft submits that the OEM device licences do not allow it to unilaterally [information regarding amendment of licence terms].
- (157) Lastly, Microsoft submits that the transaction does not change Microsoft's ability or incentives to license EAS to Motorola. Motorola sued Microsoft for the infringement of several SEPs after negotiation over the renewal of its EAS licence broke down and after Microsoft sued Motorola for infringement of the EAS patents. The U.S. International Trade Commission found that Motorola infringed an EAS patent and the resulting exclusion order became effective in July 2012. To date, Motorola and Microsoft have not agreed on licensing terms for the EAS patents. Microsoft submits that the transaction will not alter the *status quo ante* between Microsoft and Motorola in these disputes and that it is not merger-specific as Microsoft has already sought and obtained an injunction against Motorola pre-merger.
- (158) As regards incentives, Microsoft submits that the popularity of Exchange Server in enterprises depends critically on its ability to interoperate with client devices and mobile OSs that employees actually use. Given that over 90% of smartphones run Android, iOS or non-Microsoft mobile OSs, if Microsoft were to eliminate or degrade interoperability between its Exchange Server software and rival smart mobile devices, IT administrators would not replace 90% of the employees' smartphone installed base – at several hundred euros per device – and impose Windows Phone (or tablet) devices on them. Instead, Exchange customers could react in a number of ways that would constrain Microsoft's incentives to pursue this hypothetical approach (assuming it had the ability to do so).
- (159) First, there are a number of alternative communication protocols to EAS and EWS that link Microsoft Exchange Server with mobile client applications and mobile OSs, such as IMAP and POP3 ("standard communications protocols"). In order for the hypothetical strategy to be effective, Microsoft would need to stop supporting all other means of mobile device synchronisation with Exchange Server, including these standard communications protocols.
- (160) Second, if enterprise customers were to switch from using Microsoft Exchange Server to competing suppliers of enterprise mail server software and services, Microsoft would lose significant licensing revenues (up to EUR [...] billion globally, or [...] % of its global turnover, in its latest financial year). This would serve as a deterrent for Microsoft to engage in such a foreclosure strategy.
- (161) Third, there are several rival mail server software and service providers that plug into and interoperate well with the Windows architecture and can provide synchronisation with 95% of global smart mobile devices.
- (162) Fourth, 55% of its overall revenue is generated by enterprise customers and Microsoft would not jeopardize its overall relationship with those customers by incurring reputational damage and loss in enterprise customer goodwill. The hypothetical strategy would also [information regarding broader impact of strategy].

(163) Lastly, few customers would stay with Exchange Server and switch their employees to Windows Phone. Due to the BYOD policy, a significant percentage of organisations do not control the smartphone devices that their employees use and therefore could not force an enterprise-wide shift to Windows Phone. Those organisation that could force a shift would face significant costs given the cost of smartphone handsets (around an average of EUR 300 per device) – which would be more than the switching cost per mailbox to a competing mail server or service.

4.2.2.3.2. Results of the market investigation and the Commission's assessment

4.2.2.3.2.1. *Consumer segment of smart mobile devices*

(164) The Commission considers that, given the low share (close to [0-5]%) of Microsoft Exchange Server in the market for consumer mail services, the transaction does not raise serious doubts as to its compatibility with the common market with regards to the consumer segment of smart mobile devices.

(165) While it is difficult to distinguish the portion of private users that want to access, in addition to their private email, their corporate mail account from their personal devices (BYOD policy), Microsoft estimates, on the basis of a report by Juniper Research, that by 2018, the portion of such users may grow to almost 35% of the total installed base of consumer owned tablets and smartphones.

(166) Regarding this portion of private users, the market investigation confirmed that, in principle, such private users could use alternative communication protocols such as POP3 or IMAP (and SMTP for sent email) to synchronise corporate email with Microsoft Exchange Server if their employers implement these options in case Microsoft were to stop licensing EAS to third party OEMs.⁷⁹ However, the market investigation also indicated, as also noted by Microsoft, that these alternative solutions are limited to email and hence exclude synchronisation of calendar and contact information. To the extent that a sub-segment of consumers find it indispensable to seamlessly synchronise their personal smart mobile device with email as well as calendar, contact and other data stored in their corporate mail account, the analysis under section 4.2.2.3.2.2 below applies to that portion of the consumer segment of the smart mobile device market.

4.2.2.3.2.2. *Corporate segment of smart mobile devices*

(i) Ability

(167) For the reasons set out below, the Commission considers that Microsoft will not have the ability to foreclose the large majority of smart mobile device manufacturers in the corporate segment of smart mobile devices.

(168) First, the data gathered in the market investigation confirms Microsoft's submissions that the latter would face significant contractual obstacles to restrict access to its Exchange Server communication protocol.

(169) In the first place, the majority of smart mobile device competitors that responded to the market investigation confirmed that, to the extent that they have an OEM device

⁷⁹ The Commission notes, however, that according to certain respondents to the market investigation network administrators may be reluctant for security reasons (e.g. the ability to remotely wipe devices, which is one of the features of that can be implemented by using EAS), to permit personal devices to access the corporate network unless the those devices implements EAS.

licence, Microsoft does not have the ability to terminate the licences (except for the limited conditions outlined in paragraph (154) above) and/or to increase royalties and/or otherwise alter licensing terms.⁸⁰ In that regard, given that [...] OEM device licences are valid until [information regarding the duration of EAS patent licences] (and currently cover over 80% of EEA smartphone sales), the Commission considers unfounded the claim by one respondent to the market investigation (whose licence is valid until [information regarding the duration of EAS patent licences]) that Microsoft could increase royalties for its EAS licence. The Commission considers equally unfounded the claim by that same respondent that Microsoft may terminate without cause the EAS licence agreement the respondent has concluded with Microsoft, in light of the fact that under the agreement in question, Microsoft does not [information concerning the circumstances in which Microsoft has a right to terminate licences].

(170) In the second place, all but one smart mobile device manufacturer that responded to the market investigation and that currently have an OEM device licence indicated that its EAS licence covers the current (2013) version of Exchange Server and its EAS protocol, and any version released in the next 3 years.⁸¹ Moreover, contrary to the claim by one OEM respondent, Microsoft has the obligation under its licence agreement with that OEM to [information regarding future grants of rights] updated or upgraded version of the EAS protocol.

(171) In the third place, one OEM respondent that does not have an OEM device licence to EAS expressed concerns with respect to Microsoft's EAS licensing strategy towards third party email client app providers that implement EAS and may supply this software to OEMs for pre-installation on their smart mobile devices. In particular, the respondent expressed concern that Microsoft may terminate the licence with the provider of its email mobile app that it pre-installs on its smart mobile devices to allow users to synchronise the device with Exchange Server.⁸²

(172) Upon the Commission's request, Microsoft submitted a list with all mobile app providers that currently licence EAS patents. The Commission notes that the vendor of the particular email mobile app that the OEM respondent referred to in its submission to the Commission is not part of this list.⁸³ Given that the OEM's use of the specific email app would not appear to be currently licensed, the concern is therefore not merger-specific.

(173) In the fourth place, another OEM respondent submitted that Microsoft, while continuing to license EAS to third party smart mobile device suppliers, will have the ability to technically degrade certain versions of EAS or to restrict their interoperability to impact the competitiveness of its licensees in the downstream market while its own smart mobile devices will benefit from superior interoperability.

80 See replies to questionnaire Q1 to competitors of 29 October 2013, question 47.

81 See replies to questionnaire Q1 to competitors of 29 October 2013, question 48.

82 The OEM noted that Microsoft had terminated the EAS license with the email app provider Emtrace Technologies ("Emtrace") in 2012 in the context of the patent dispute in relation to EAS between Motorola and Microsoft. Microsoft submits that it terminated Emtrace's 2007 licence to EAS for cause [information regarding reason for termination for cause].

83 See also footnote 77.

(174) The Commission considers, however, that Microsoft cannot technically degrade any version of EAS as the OEM device licence is a patent-only license, not a technology license. The EAS protocol has been made available as a specification that must be implemented by third parties as software code in their own servers, devices or apps.⁸⁴ Respondents to the market investigation support this fact as they state that they independently develop their own software for the client-side implementation of EAS.⁸⁵

(175) In addition, Microsoft cannot degrade future versions of the specification by removing key functionalities because if it did, third parties could implement current versions of the EAS specifications that are supported for backward compatibility in Exchange Server.⁸⁶ Moreover, if Microsoft were to impair connections between licensed devices and new versions of Exchange Server, it would discourage Exchange Server customers from upgrading to the newest version of Exchange Server because this would impair compatibility with the smart mobile devices most commonly used by their employees.

(ii) Incentives

(176) The Commission notes that while it cannot be excluded that Microsoft may have a certain incentive to engage in the hypothetical foreclosure strategy, this is tempered by the fact that customers may switch in the medium and longer term, thereby jeopardising a certain percentage of Exchange Server revenues on the server-side of the business (as well as EAS licensing revenues on the device side).

(177) On the one hand, the market investigation did not confirm Microsoft's claim that corporate users could easily switch from using Microsoft Exchange Server to competing suppliers of enterprise mail server software and services, in particular because the cost and time for switching appear to be significant.⁸⁷ In addition, certain respondents suggested that, assuming customers cannot switch away from Exchange Server, Microsoft may have a greater economic incentive compared to the pre-merger situation to stop licensing EAS to third parties with a view to increasing its sales of smart mobile devices. Indeed, post-transaction, Microsoft's gross margin on the sale of the integrated device, including both the OS and the hardware, appears to be higher than the pre-merger gross margin achieved by Microsoft from the licensing of the OS alone.

(178) On the other hand, certain respondents to the market investigation indicated that despite the significant cost and time switching would take, in the medium or longer run at least a significant portion of Exchange Server customers would switch to alternative enterprise mail software or service providers. Notably, half of the Exchange Server

84 In other words, there is no EAS software code that Microsoft makes available to these third parties for installation on, or integration into, a server, device, or application.

85 See replies to questionnaire Q1 to competitors of 29 October 2013, question 46.

86 According to Microsoft, all of the functionality is documented in past and current EAS specifications that are publicly available.

87 See replies to questionnaire Q1 to competitors of 29 October 2013, questions 55, 60 and 61. See replies to questionnaire Q2 to developers of applications for smart mobile devices of 30 October 2013, questions 44, 49 and 50; See reply to questionnaire Q3 to Microsoft Exchange Server and Exchange ActiveSync Competitors of 30 October 2013, questions 17, 22 and 23. See reply to questionnaire Q4 to Microsoft Exchange Server Customers of 30 October 2013, questions 16, 17, 22 and 23.

customers expressing an opinion stated that they would eventually replace Exchange Server with another mail server software or service in order to enable synchronisation of email, calendar, contact and task data with smart mobile devices although most stressed the significant cost and effort this would cause.⁸⁸ As one customer put it: "*Replacing the whole backend infrastructure [...] seems not appropriate however in worst case could be a possible result.*"⁸⁹

- (179) Moreover, certain respondents to the market investigation noted that post-transaction, it would not make business sense for Microsoft to stop licensing EAS to third party suppliers of smart mobile devices and/or mobile OSs or mobile apps, or to make such licenses uneconomical.⁹⁰ HP submits that "*it is in Microsoft's interest to facilitate widespread adoption of its Exchange software and OS. If interoperability functionality is not available, the viability of Microsoft software and OS diminishes substantially for end users.*" Jolla, a mobile OS supplier, states that "*ActiveSync business is mainly server side business for Microsoft. Therefore, we believe that it does not make business sense for Microsoft to stop licensing the technology to other providers. ActiveSync is the best solution for corporate customers and it is also Microsoft's benefit to continue supporting them (regardless of the OS they are using).*"

(iii) *Effects*

- (180) For the reasons below, the Commission considers that a potential foreclosure strategy would not have a significant effect on the smart mobile device market and its possible segments.
- (181) First, a portion of the enterprise mail server software and services market would not be affected by such a strategy as certain companies do not rely on Exchange Server. According to Microsoft's estimates, this portion would be [40-50]% in the EEA and [60-70]% if the relevant product market were the overall enterprise mail server software and services market and [10-20]% in the EEA and [20-30]% worldwide if the relevant product market were confined to on-premises mail server software and IaaS.
- (182) Second, as discussed in detail in paragraphs (168) above, the portion of the market that could be affected by such a foreclosure strategy would be limited, due to the fact that a large majority of smart mobile device suppliers are contractually protected against Microsoft engaging in a foreclosure strategy through the use of EAS and/or hampering interoperability with new versions of Exchange Server
- (183) Third, Nokia's smartphones running Windows Phone currently have a low share in the market for smart mobile devices (including the possible segment of devices for corporate use, where the share of Windows Phone, including the share of the D&S

⁸⁸ See reply to questionnaire Q4 to Microsoft Exchange Server Customers of 30 October 2013, question 16. The other half of respondents expressing an opinion stated that they would purchase or support only smart mobile devices supporting full synchronisation with Microsoft Exchange Server. No customer said that they would enable synchronisation of email via Pop3, SMTP and/or IMAP protocols (nor could they use these protocols to enable synchronisation of calendar, tasks, or contacts as these protocols do not support this). Two customers expressed no opinion.

⁸⁹ *Idem.*

⁹⁰ See replies to questionnaire Q1 to competitors of 29 October 2013, question 51. Note that the majority of responding competitors do not express a clear view on this question.

Business, was [0-5]% of total activations of smartphones in the worldwide enterprise segment in Q1 2013). As a result, the Commission considers that Microsoft would be unable to foreclose suppliers such as Apple or Samsung from the overall market for smart mobile devices in the foreseeable future, as these suppliers currently enjoy a much stronger position both in the consumer segment as well as in the corporate segment.

(iv) Conclusion

(184) Based on the above, the Commission concludes that the proposed transaction will not give rise to serious doubts as to its compatibility with the internal market as a result of input foreclosure through restricting Microsoft's Exchange Server communication protocol licensing.

4.2.3. Nokia's possible post-transaction conduct with respect to its SEPs and non-SEPs

(185) Several respondents to the market investigation raised concerns about possible post-transaction conduct by Nokia with respect to its portfolio of SEPs and non-SEPs relevant for smart mobile devices, which Nokia will continue to own after post-transaction.

4.2.3.1. SEPs and non-SEPs

(186) Thousands of different patents may read on a smart mobile device. These patents may include both SEPs and non-SEPs and are generally held by various companies. It is clear that smart mobile devices (operating on a mobile software platform) must, in order to operate effectively, comply with various standards that have been developed for mobile communications.

(187) The European Telecommunication Standard Institute's ("ETSI") IPR Policy defines SEPs as follows: *"ESSENTIAL' as applied to IPR means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR. For the avoidance of doubt in exceptional cases where a STANDARD can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered ESSENTIAL".*⁹¹

(188) A company wishing to produce goods complying with a certain standard on which SEPs read cannot do so without either a licence to the technology incorporated in that standard on which the SEPs read or by infringing the patents covering that technology. Prior to the adoption of a standard, multiple technologies may have competed to become a standard. However, once a standard has been adopted and widely implemented by the industry and in the absence of competing standards, firms that use these technologies may be severely limited in their ability to use another technology. The very purpose of choosing a standard is that the industry agrees on a specific technological solution rather than alternative technologies. Inter-technology competition that existed before is therefore impeded and any alternative technologies or technical solutions that may have had the same functionalities as the one chosen as the standard technology may have a

91 http://www.etsi.org/WebSite/document/Legal/ETSI_IPR-Policy.pdf.

significantly reduced value. In other words, once the standard is set, and in the absence of a competing standard, technology competition is largely undermined.

(189) The Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Horizontal Guidelines") acknowledge the significant positive economic effects that may be produced by standardisation agreements.⁹² However, the Horizontal Guidelines note that "[b]y virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard-setting, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the company could thereby control the product or service market to which the standard relates. This in turn could allow companies to behave in anti-competitive ways, for example by 'holding-up' users after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive royalty fees thereby preventing effective access to the standard".⁹³

(190) Standard Setting Organisations ("SSOs") have policies and procedures in place intended to facilitate the standardisation of the selected technology, based on technical performances and other relevant elements. SSOs typically provide in their governing rules that their members should reveal all relevant IPR in advance of adoption of a standard, or to commit to license any IPR relevant to the standard on "(fair,) reasonable, and non-discriminatory terms" ("FRAND") terms.

(191) As set out in the Horizontal Guidelines: "*FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees*"⁹⁴.

(192) FRAND commitments essentially oblige SEP holders: (i) to make the patent in question available to all interested third parties; (ii) not to discriminate between different licensees; and (iii) to offer a licence to the patent on fair and reasonable terms. SEP holders do, however, have the right to conduct undistorted negotiations with interested parties concerning the exact terms and conditions of the licence, including the exact level of royalties and the right to enforce agreements on such terms by means of litigation.

(193) As regards non-SEPs, the commercial importance of these patents varies. Such patents are not part of a formal technical standard, the nature of many such patents may be incremental, and it is often easier to design around a patent falling in this category. Non-SEPs may relate to features used to differentiate competitors' products on the market, thus creating dimensions on which firms aggressively compete. FRAND

92 See Commission Communication, Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements (OJ C 11, 14.1.2011, page 1-72), paragraph 263.

93 *Ibid*, paragraph 269.

94 See Commission Communication, Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements (OJ C 11, 14.1.2011, page 1-72), paragraph 287.

commitments do not apply to non-SEPs. That being said, non-SEPs can also potentially be the basis for foreclosure of rivals and possible abusive conduct. For example, in exceptional circumstances, notably where a technology has become an indispensable input for competitors, a refusal to grant access to that technology may be abusive.⁹⁵ However, this has to be assessed with regard to the specific factual circumstances in each individual case.

4.2.3.2. Concerns expressed by certain respondents to the market investigation in relation to the post-transaction conduct of Nokia

(194) Certain respondents to the market investigation expressed a number of concerns with regards to the possible post-transaction licensing practices of Nokia after the demerger of its D&S business.

4.2.3.2.1. The proposed transaction creates or strengthens Nokia's dominant position in patent licensing by eliminating the current restraints on Nokia that result from its current activity in the mobile phone business

(195) A number of respondents to the market investigation claimed that the proposed transaction creates or strengthens Nokia's dominant position in patent licensing, both regarding its SEPs and non-SEPs, by eliminating the restraints on Nokia that result from its current activity in the mobile phone business.

(196) First, the respondents contend that Nokia was previously constrained in exploiting its market power with regard to SEPs and non-SEPs in several ways. In the first place, Nokia required licences (often granted as cross-licences) from its competitors that also hold patents in order to avoid findings of patent infringement. In the second place, Nokia was vulnerable to counter-attack if it aggressively enforced its patents (“mutually assured destruction”). In the third place, Nokia had a general incentive to seek reasonable royalties so as to keep consumer prices for its products low and not to hamper demand in the downstream devices market. In the fourth place, Nokia had an incentive not to outsource patent enforcement to so-called Patent Assertion Entities (“PAEs”), so as to discourage other mobile phone manufacturers from also using such entities against Nokia’s mobile device business.

(197) Second, the respondents allege that the proposed transaction will eliminate these restraints, as it will separate Nokia’s patent portfolio from the D&S mobile phone business and thereby increase, post-transaction, Nokia’s ability and incentive to exploit the market power derived from its patent portfolio.

(198) Third, the respondents claim that the effect of the present transaction is different from the *Google/Motorola* transaction. Google's acquisition of Motorola’s patents was designed to deter future litigation against Android OEMs by improving the balance of patent portfolios between different industry participants. The present transaction, however, will result in an imbalance as Nokia will no longer have its own operations in the field of mobile devices.

Case C-238/87 *Volvo v. Veng* [1988] ECR 6211, paragraph 9; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* (*Magill*) [1995] ECR I-743, paragraph 50; Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-5039, paragraph 35; Case T-201/04 *Microsoft* [2007] ECR II-3601, paragraph 332.

4.2.3.2.2. The Merger Regulation is applicable to review the notified operation's effect on Nokia

(199) A number of respondents to the market investigation argued, with reference to case law of the European courts⁹⁶ and the Commission's decisional practice,⁹⁷ that the Commission can and must review all effects of a notified transaction on competition regardless of whether they relate to the merging parties or a third party. A significant impediment to effective competition is likely to result where a concentration affects the structure of a market and/or from the abilities and incentives of certain undertakings to raise prices or otherwise foreclose competition. Such effects on competition may occur through the effects that the concentration will have on the conduct of third parties. In light of the concept of *effet utile* of the Merger Regulation, the substantive test needs to also apply to these instances. As a corollary, the Merger Regulation should also be interpreted as allowing the Commission to accept commitments offered by a seller where there is some causal link between the structural change that results from a concentration and the position and incentives of the seller.

4.2.3.2.3. The proposed transaction will result in mobile device manufacturers other than Microsoft paying increased royalties for the use of Nokia's patents

(200) A number of respondents to the market investigation claimed that the proposed transaction will result in mobile device manufacturers other than Microsoft paying increased royalties for the use of Nokia's patents.

(201) First, the respondents draw the Commission's attention to the peculiar structure of the proposed transaction, whereby Nokia transfers the D&S Business to Microsoft, but retains ownership of the relevant patent portfolio. In their view, this specific transaction structure will allow Nokia to increase its patent royalties and thus raise the costs of mobile device manufacturers other than Microsoft. They also submit that the decision to specifically attribute EUR 1.65 billion of the total purchase price paid by Microsoft to Microsoft's 10-year licence to Nokia's patents is designed to allow Nokia to raise its royalty rates in future licence negotiations.

(202) Second, the respondents claim that, since Nokia will no longer need to enter into cross-licences following the proposed transaction, Nokia's anticipated change to prefer unilateral licence negotiations will enable it to ask for higher royalty payments. Royalty maximization would now be Nokia's principal aim in bilateral negotiations from mobile device manufacturers other than Microsoft. The precedent of Ericsson, which has allegedly multiplied its royalty demands for patents on which mobile devices read following the sale of its share in the Sony-Ericsson Mobile communications joint-venture to Sony, demonstrates that the outlined behaviour is likely.

⁹⁶ Joined Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission* ("Kali und Salz") [1998] ECR I-1375, paragraph 171.

⁹⁷ Case IV/M.1383 - *Exxon / Mobil*, Commission decision of 29 September, 1999, paragraphs. 225–229; Case COMP/M.2434 - *Grupo Villar Mir / EnBW / Hidroelectrica del Cantabrico*, Commission decision of 26 September, 2001; Case COMP/M.2684 – *EnBW / EDP / Cajastur / Hidrocantabrico*, Commission decision of 19 March, 2002; Case COMP/M.4519 – *Lagardère/ Sportfive*, Commission decision of 18 January 2007, Case COMP/M.3696 - *E.ON/ MOL*, Commission decision of 21 December 2005.

(203) Third, as far as Nokia's SEPs are concerned, the respondents submit that Nokia's FRAND obligations will not replace the constraint on Nokia's licensing policy provided by its activity in mobile device manufacturing. In the first place, the legal and practical effects of FRAND commitments are subject to considerable uncertainty under contract, patent and antitrust law and national courts have rendered differing interpretations of the legal effects of FRAND commitments. In the second place, it is, at present, unclear how to determine FRAND royalties and on the basis of what criteria they should be established. Usually, there will not be only one specific FRAND royalty for a patent or portfolio, but a range of royalties that may all qualify as FRAND, but which could vary significantly. The proposed transaction will give Nokia the ability and incentive to strive for the maximum FRAND rate.

(204) Fourth, the respondents argue that Nokia will have a greater incentive post-transaction, to disaggregate its patent portfolio and enter into agreements with PAEs. This will be one way for Nokia to partly circumvent its FRAND obligations. It will also result in the stacking of royalties and a higher overall rate. One respondent observes that Nokia already has a history of selling or transferring patents to PAEs listing 16 such transactions since 2007.

4.2.3.2.4. Increased enforcement by Nokia of non-SEPs against mobile device manufacturers other than Microsoft

(205) A number of respondents to the market investigation claimed that the proposed transaction will result in increased enforcement by Nokia of non-SEPs against mobile device manufacturers other than Microsoft.

(206) First, the respondents argue that while pre-transaction, Nokia did not include its non-SEPs when negotiating cross-licences, it will have the incentive to do so post-transaction, including the threat of seeking injunctions, given that it is no longer active in the supply of smart mobile devices.

(207) Second, the respondents submit that by using its non-SEPs – which are not subject to FRAND commitments – as an additional source of licensing revenue post-transaction, Nokia will be able to further increase licensing costs of mobile device manufacturers other than Microsoft. Nokia has the ability to engage in such a course of action as its non-SEP portfolio is "commercially essential" for smart mobile device manufacturers. Its non-SEP portfolio is also so extensive that in practice, it does not allow mobile device manufacturers to design around Nokia's non-SEPs.

(208) Third, the respondents argue that defending themselves against patent infringement actions before the courts is costly and therefore ineffective. Even if an OEM has the resources to resist some of the anticipated lawsuits by Nokia, it will ultimately be incapable of withstanding the burden of incessant legal actions by a holder of a patent portfolio as large as Nokia's. In practice, mobile device manufacturers other than Microsoft will have no other choice than to enter into a licensing agreement with Nokia, whether or not Nokia's patents are commercially essential.

4.2.3.2.5. The proposed transaction will result in anticompetitive effects

(209) A number of respondents to the market investigation submitted that Nokia's changed incentives to no longer engage in cross-licensing and to conclude unilateral licences with higher royalty rates would lead to a significant impediment to effective competition.

- (210) First, the cost of OEMs (other than Microsoft, whose terms for the licensing of Nokia's patents relevant to the D&S Business are fixed as part of the proposed transaction) would be raised and some of these players could potentially be foreclosed.
- (211) Second, Nokia's presumed increased royalties will disproportionately harm actual or potential new entrants and smaller OEMs, which have lower margins and which will need to pass on their costs to the consumer. Higher margin device manufacturers, and those which are protected by an existing license, will thereby gain a competitive advantage.
- (212) Third, the respondents submit that the increased costs for smart mobile device manufacturers (increased royalty rates, royalty stacking through Nokia and PAEs) would eventually be passed on to consumers in the form of higher prices.

4.2.3.3. The views of the Notifying Party and of Nokia

- (213) Both Microsoft and Nokia (whose views on the above outlined claims the Commission sought as part of its investigation, despite it not being a party to the proposed transaction) argued that the assessment of the possible significant impediment to effective competition deriving from Nokia's post-transaction conduct falls outside the scope of the Commission's assessment of the proposed transaction under the Merger Regulation.
- (214) First, Microsoft and Nokia claim that Article 2 of the Merger Regulation refers to the impact on competition of "concentrations" and that the notion of concentration enshrined in Article 3 of the Merger Regulation only comprises the merging parties, that is to say, in the case at hand, the acquirer (Microsoft) and the target (the D&S business), and not the seller (Nokia). Moreover, they submit that in order for the Merger Regulation to capture the possible significant impediment to effective competition of a proposed transaction, that may arise from the conduct of a third party, the merged entity has to play an active role in the creation of such an impediment or, at the very least, have incentives that are closely aligned to those of the third-party.
- (215) Second, Nokia notes that there is nothing unusual about the transaction structure whereby it will maintain ownership of its SEPs and non-SEPs generated during the time it engaged in the business now being acquired by Microsoft. IBM did the same in 2004 when it sold its PC business to Lenovo, as did Siemens, when it sold its mobile device division to BenQ, and Ericsson when it decided to exit the mobile phone business by selling its share in Sony-Ericsson to Sony. While Nokia is keeping its patent portfolio, the situation as regards the exercise of its IP rights would have been identical had Nokia decided to shut down its D&S Business.
- (216) Third, Nokia submits that its patent portfolio of over 10 000 patent families results from a cumulative Research and Development ("R&D") investment of EUR 50 billion over the past two decades and that it currently generates annual revenue of EUR 500 million from its IP business. The EUR 1.65 billion payment is thus [information regarding the valuation of the patents transferred to Microsoft].
- (217) Fourth, Microsoft states that the licence acquired from Nokia will enable it to achieve a broad level of patent peace. The fundamental purpose of the proposed transaction for Microsoft is to acquire Nokia's D&S business assets and to ensure that it is able to use Nokia's patented inventions to build upon the assets that it is acquiring from Nokia without infringing its rights. Furthermore, the new Nokia patent licence,

unlike the pre-existing licence that would have expired in two years, will include Nokia's substantial portfolio of wireless and cellular SEPs, and it covers all Microsoft software, hardware, products or services. Microsoft submits that a non-exclusive licence from Nokia is entirely sufficient to achieve this goal and that it is significantly cheaper to licence the Nokia portfolio than to acquire it. Based on a contemporaneous Microsoft document elaborated during the negotiation of the transaction, Microsoft estimates that an acquisition including Nokia's patent portfolio would have cost it an estimated [...] to the cost of the proposed transaction.

- (218) Fifth, Nokia and Microsoft argue that, post-transaction, the value of Nokia's patent portfolio will remain unchanged. As a result, the end result of the negotiations for the licensing of Nokia's patent portfolio to third parties will continue to reflect the same value of Nokia's patents. By the same token, Nokia further notes that the proposed transaction will not diminish the value of patents relevant to smart mobile devices held by mobile device manufacturers other than Microsoft. Post transaction, these mobile device manufacturers will be able to negotiate licensing agreements for the value of their patents with both Microsoft, and to the extent they have patents relevant to Nokia's remaining or new businesses, with Nokia.
- (219) Sixth, Nokia affirms that, post-transaction, it will not be able to claim higher than FRAND royalties for its SEPs, as they will continue to be subject to the FRAND commitments given by Nokia in accordance with the IPR policies of the relevant SSOs.
- (220) Seventh, Nokia points out that it will remain in the market as an operating company through its Nokia Solutions Network ("NSN") and maps (HERE) businesses. As such, Nokia will need to enter into cross-licences for these businesses. Furthermore, any attempt to enforce its mobile device patents could lead to retaliation against these businesses.
- (221) Eighth, with regard to its non-SEPs, Nokia notes that it is not aware that any of these are commercially essential to a company active in smart mobile devices, mobile OS and/or mobile apps. [information regarding Nokia's past licencing policy for its non-SEPS], these incentives may change post-transaction, which would be a pro-competitive development.

4.2.3.4. The Commission's assessment

4.2.3.4.1. Introduction

- (222) It is important to underline that the proposed transaction involves the acquisition by Microsoft of the D&S Business. These two undertakings are the parties to the concentration. Hence, the concerns relating to the business that Nokia retains are not horizontal in nature, as they do not arise from the existence of a horizontal overlap between the undertakings that are parties to the proposed concentration. They are also not non-horizontal in nature, as they do not arise from the existence of a vertical relationship between the activities of the parties to the proposed transaction. They finally do not arise from the fact that the parties to the proposed transaction are active in neighbouring markets.
- (223) Instead, the concerns derive from the alleged change in post-transaction incentives of the seller, Nokia that result from the de-merger, that is to say from the divestment of the D&S Business to Microsoft. This explains why the Commission has assessed the allegations regarding these possible-anticompetitive effects separately from the analysis

of the possible horizontal and non-horizontal effects of the concentration (the business combination between Microsoft and the D&S Business).

4.2.3.4.2. Scope of the Merger Regulation

(224) The first issue the Commission has assessed is whether possible post-transaction conduct of Nokia falls within the scope of the Commission's assessment of the proposed transaction under the Merger Regulation. For the reasons set out below, the Commission considers that the possible post-transaction conduct of Nokia falls outside the scope of the Commission's assessment of the proposed transaction under the Merger Regulation.⁹⁸

(225) First, this conclusion is consistent with the wording of the Merger Regulation and the Implementing Regulation. Article 2(1) of the Merger Regulation provides that in appraising a concentration, the Commission shall take into account the need to maintain and develop effective competition in view of, among other things, "*the structure of all the markets concerned*" and "*the market position of the undertakings concerned*". Under Article 2(3) of the Merger Regulation there must be a causal effect between the merger and the significant impediment to effective competition.⁹⁹ According to Article 1(1), the Merger Regulation applies to concentrations with a Union dimension. Article 3(1) of the Merger Regulation defines a concentration as the merger of two or more previously independent undertakings or parts of undertakings or the acquisition by one or more undertakings of direct or indirect control over the whole or parts of one or more undertakings.

(226) Moreover, Article 5(2) of the Merger Regulation further explains that "*where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or the sellers*". The Commission Consolidated Jurisdictional Notice clarifies that the "undertakings concerned" are the undertakings "participating in a concentration" and that, in the case where parts of an undertaking are being acquired, "*the undertakings concerned will be the acquirer(s) and the acquired part(s) of the target undertaking, but the remaining business of the seller will be ignored.*"¹⁰⁰ Article 11 of the Implementing Regulation and section 2 of the Form CO annexed thereto, also clearly distinguish between the notifying party or parties, and other involved parties, such as the seller, and third parties. It is therefore clear from the provisions of the Merger Regulation, the Implementing Regulation and the Commission's Consolidated Jurisdictional Notice that these undertakings are the so-called "undertakings concerned" by a concentration, that is to say the parties thereto.

(227) In addition, under Article 2(4) of the Merger Regulation, in the case of a joint venture constituting a concentration, if coordination among the parents ensues from the

⁹⁸ This is without prejudice to the Commission's power to review possible anti-competitive practices under the applicable antitrust rules in separate proceedings. Such proceedings, based on Articles 101 or 102 TFEU, are appropriate tools to investigate and address the types of competition concerns that have been raised by some respondents.

⁹⁹ See also Case C-12/03 P *Commission v. Tetra Laval* [2005] ECR I-987, paragraphs 79 and 84.

¹⁰⁰ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C95/1, par. 129.

creation of the joint venture, this behaviour shall be appraised from the viewpoint of Article 101 TFEU.

- (228) Finally, it is clear from the provisions concerning remedies included in the Merger Regulation and the Implementing Regulation¹⁰¹ that only the acquirer and the target of the acquisition can offer commitments to address a risk of a significant impediment to effective competition. Similarly, conditions, obligations and penalties aimed at ensuring compliance with such commitments can be imposed only on those parties (and not on third parties, including the seller).
- (229) By contrast, taking the opposite view would lead, *in extremis*, to the result of requiring the Commission to analyse, in every case, not only the structural impact of a concentration resulting from the combination of the assets of the parties thereto in the markets where they are active, but also the impact of a concentration on all relevant markets where the seller operates.
- (230) Second, the Commission considers the above conclusion is not affected by the judgment of the Court of Justice in *Kali und Salz* or the previous Commission decisions pointed to by the respondents, all of which concerned cases in which the anti-competitive effects of the concentrations arose as a result of the post-transaction conduct of third parties in combination with the activity of the merged entity on the relevant market, and not just of the seller.
- (231) *Kali und Salz* concerned a case of joint dominance, in which the merging parties' behaviour was part of a behaviour which, together with those of other undertakings, would give rise to collective dominance concerns after the merger. It was against this backdrop that the Court of Justice held that:

“A concentration which creates or strengthens a dominant position on the part of the parties concerned with an entity not involved in the concentration is liable to prove incompatible with the system of undistorted competition which the Treaty seeks to secure. Consequently, if it were accepted that only concentrations creating or strengthening a dominant position on the part of the parties to the concentration were covered by the Regulation, its purpose as indicated in particular by the above mentioned recitals would be partially frustrated. The Regulation would thus be deprived of a not insignificant aspect of its effectiveness, without that being necessary from the perspective of the general structure of the Community system of control of concentrations.”

¹⁰¹ Article 6(2) Merger Regulation provides that: “Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts ... it shall declare the concentration compatible with the common market pursuant to paragraph 1(b). The Commission may attach to its decision ... conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission” Article 6(3) of the Merger Regulation further confirms that commitments given under the Merger Regulation to ensure compatibility of the concentration with Article 2 are to be given by the undertakings concerned. It provides that decisions taken under Article 6(1)(b) can be revoked when the “undertakings concerned” commit a breach of the commitment. Similarly, Article 14(2)(d) gives the Commission the power to impose fines on the “undertakings concerned” (or acquirers) where they fail to comply with a condition or obligation imposed by decision under Article 6(1)(b).

- (232) The Court of Justice’s judgment did not therefore deal with the situation at issue in this case, where the alleged significant impediment to effective competition depends only on the conduct of a third party (Nokia, the seller) without any involvement of the merged entity.
- (233) The same is true of the previous Commission decisions pointed to by the respondents. In *Exxon/Mobil*,¹⁰² Exxon held a (non-controlling) 25% stake in Gasunie (the dominant player in the Dutch gas wholesale transmission market) prior to the transaction and Mobil was one of only two “active” competitors in that market, and was the only competitor with reserves that had not been committed to Gasunie. The Commission found that the merger of Exxon and Mobil would have strengthened Gasunie’s dominant position, mainly because, as a result of Exxon’s “*important and lucrative stake*” in Gasunie, “*a merger between Mobil and Exxon would in normal circumstances lead to a greatly diminished incentive for Mobil to compete against Gasunie*”. Hence, the effect of the concentration would have resulted from a structural link between Gasunie and the merged entity. Moreover, the effects of this structural link would have been felt in a market, in which both the merged entity and the third party (Gasunie) were active. It is clear that in that scenario, the merged entity played a key role in the significant impediment to effective competition that was identified, as the concentration would reduce the merged entity's incentive to compete with the third party (in which it held an important stake), thereby enhancing that third party's dominant position on the affected market.
- (234) In *Grupo Villar/EnBW/ Hidroeléctrica del Cantábrico*,¹⁰³ EDF was acquiring joint control of Hidrocantábrico, a company with generating capacity in Spain. Prior to the transaction, EDF exported electricity to Spain. The Commission found that the EDF's acquisition of electricity generating capacity in Spain would substantially strengthen its position in the Spanish market without it having to invest in interconnection capacity and found that EDF had incentives to avoid increasing interconnection capacity. The Commission concluded that, if the perspectives for new entry and pricing pressure were to be reduced, the transaction would, in addition to strengthening EDF's position, reinforce the Endesa/Iberdola duopoly in the Spanish market for wholesale electricity.
- (235) In *EnBW/EDP/Cajastur/Hidroeléctrica*,¹⁰⁴ subsequent to EDF’s acquisition, EDP was acquiring joint control of Hidrocantábrico. Again, the Commission found that the concentration would reduce EDF’s incentives to compete with third parties by investing in interconnection capacity, and thereby maintain the barriers to entry that preserved high prices and in turn strengthen the third parties' (Endesa’s and Iberdola’s) position on the affected market (the market for wholesale electricity in Spain).
- (236) In *Lagardère/Sportfive*,¹⁰⁵ certain respondents to the market investigation alleged that, post-transaction, third parties, such as sport event organisers and broadcasting rights owners, would have an incentive to partner with the merged entity to the

102 Case IV/M. 1383 - *Exxon / Mobil*, Commission decision of 29 September 1999

103 Case COMP/M.2434 - *Grupo Villar / EnBW / Hidroeléctrica del Cantábrico*, Commission decision of 26 September 2001.

104 Case COMP/M.2684 - *EnBW / EDP / Cajastur / Hidroeléctrica*, Commission decision of 19 March, 2002.

105 Case COMP/M.4519 – *Lagardère/ Sportfive*, Commission decision of 18 January 2007.

detriment of competing intermediaries (and ultimately TV operators acquiring broadcasting and/or marketing rights from these intermediaries) because of the structural link between the merged entity and Canal+ (in which the merged entity would hold a minority shareholding). Although the allegation focused on the incentives of third parties post-transaction to favour the merged entity post-transaction the behaviour of the merged entity itself, as well of as Canal+, contributed to the risk of significant impediment of effective competition. When dismissing that allegation, the Commission focused on the post-transaction incentives of the merged entity to favour Canal+ to the detriment of other TV broadcasters and on Canal+'s increased incentives to purchase broadcasting rights from the merged entity.

(237) Finally, in *E.ON/MOL*,¹⁰⁶ the Commission accepted commitments from E.ON, according to which E.ON would procure the seller to perform certain actions. This entailed the termination of a long-term agreement with E.ON and the divestiture of certain remaining minority stakes in the target that E.ON would acquire. The commitment consisting of the termination of a long-term agreement between E.ON and the seller directly involved the buyer, E.ON, which was a party to the agreement to be terminated. The commitment consisting of the divestiture of the seller's stake in the target also concerned a structural link between a party to the concentration (the target) and the seller. Moreover, the severance of this link also involved E.ON as the acquirer of the target business, in which the stake would need to be released. The situation at stake in *E.ON/MOL* was therefore different from that in the present case, where respondents have argued that the Commission should accept commitments, which exclusively concern the relationship of Nokia with third parties, with Microsoft, the buyer, not being a part of that relationship, but nonetheless remaining liable for Nokia's fulfilment of such commitments.

4.2.3.4.3. Assessment of Nokia's possible post-transaction conduct if it were to fall within the scope of the Commission's assessment of the proposed transaction under the Merger Regulation

(238) Even if the assessment of Nokia's post-transaction conduct were to fall within the scope of the Commission's assessment of the proposed transaction under the Merger Regulation, that conduct would not, for the reasons set out below, lead the Commission to conclude that the transaction gives rise to serious doubts as to its compatibility with the internal market.

4.2.3.4.3.1. *Structure of the proposed transaction and consideration paid by Microsoft*

(239) As a preliminary remark, the Commission rejects the arguments put forward by certain respondents to the market investigation, according to which the structure of the proposed transaction is dictated by the objective of achieving a significant impediment to effective competition and that the valuation of Microsoft's license for Nokia's patent portfolio is artificially inflated.

(240) The Commission notes that Microsoft has explained to a satisfactory extent the reasons underlying the structure of the proposed transaction. By the same token there is a plausible commercial explanation, including based on contemporaneous internal documents, regarding the valuation that it attached to the Nokia patent license.

¹⁰⁶ Case COMP/M.3696 - *E.ON/MOL*, Commission decision of 21 December 2005.

(241) The Commission considers that the structure of the proposed transaction appears, rather, to be dictated by Microsoft's interest for, on the one hand, acquiring the D&S Business and, on the one hand, ensuring that it has access to the relevant IP, while, at the same time, not being required to purchase the whole of Nokia's IP, which would have been more expensive.

(242) The Commission also considers that Microsoft's internal documents, including Board presentations and valuation studies, support the value it attaches to the license to Nokia's patents (those documents indicate that [information regarding Microsoft valuation of license]).

4.2.3.4.3.2. *Nokia's post-transaction ability to enforce its SEPs*

(243) Regarding Nokia's post-transaction ability to enforce its SEPs, the Commission's assessment is based on the following considerations.

(244) First, Nokia's ability to enforce its SEPs is not merger-specific. That ability already existed (or did not exist) prior to the proposed transaction. The same is true with regard to Nokia's ability to enter into agreements with PAEs.

(245) In this respect, the Commission notes that a number of market participants already have a licence or cross-licence to Nokia's mobile device SEPs. Companies such as [...] all have concluded patent licence agreements with Nokia.

(246) In terms of 2012 sales of smart mobile devices, [70-90%] of the EEA market of smart mobile devices (sales measured in volume and excluding Nokia and Microsoft devices) and [60-70%] of the worldwide market were covered by existing patent licensing agreements for the foreseeable future. Only a small minority of OEMs with limited market share in the EEA and worldwide have patent licensing agreements with Nokia that expire in the next two years.

(247) The [...] largest suppliers of smart mobile devices in the EEA in terms of 2012 market share in volume, apart from Nokia, all have entered into patent licensing agreements with Nokia in relation to the latter's SEPs that last until [...].

(248) Samsung, currently by far the largest smart mobile device supplier in the EEA in terms of 2012 market share in volume, renewed on 4 November 2013 its patent licensing agreement with Nokia until 2018, [...]. Any disagreement regarding royalty payments will be solved through binding arbitration under the rules of arbitration of the International Chamber of Commerce. While Nokia's press release¹⁰⁷ notes that "*Samsung will pay additional compensation to Nokia for the period commencing from January 1, 2014 onwards*", third party arbitration should ensure that royalty payments are in line with FRAND terms as far as SEPs are concerned (see also paragraph (251) below).

(249) Nokia's licence agreement with Apple,¹⁰⁸ the second largest manufacturer of smart mobile devices in the EEA, lasts until [...]. [Information on one or more licencing

107 See <http://press.nokia.com/2013/11/04/samsung-extends-the-patent-license-agreement-between-nokia-and-samsung-for-five-years-companies-will-enter-into-binding-arbitration-to-settle-the-amount-of-additional-compensation/>.

108 See <http://press.nokia.com/2011/06/14/nokia-enters-into-patent-license-agreement-with-apple/>.

agreements between Nokia and smart mobile device manufacturer(s)]. Blackberry (formerly known as Research in Motion, "RIM"), the fourth largest supplier, has an agreement in place until [...]. [Information on one or more licencing agreements between Nokia and smart mobile device manufacturer(s)].

(250) Based on the above, the Commission considers that Nokia's ability to enforce its SEPs against these OEMs with a view to increasing the relevant royalty rates is not merger-specific. The Commission also notes that Nokia's ability to enforce its SEPs against that limited portion of the market (mainly comprising Asian manufacturers, which, according to Nokia, have not sought, or are actively resisting taking, licenses to Nokia's SEPs) is also not merger-specific. Such ability existed pre-transaction and will continue to be present after the proposed transaction.

(251) Second, the Commission considers that Nokia's ability in relation to its SEPs is further limited by the various FRAND commitments Nokia has given to SSOs. These commitments remain intact and fully in force as the ownership and control over Nokia SEPs is not changing.

4.2.3.4.3.3. *Nokia's post-transaction incentives to enforce its SEPs*

(252) Even if Nokia's incentives to enforce its SEPs would change post-transaction, the effects of any such change will be limited for the following reasons.

(253) First, Nokia remains a company with a strong commercial arm, which clearly distinguishes Nokia from a PAE, whose only commercial activity consists of the valorisation of its IPR. According to Nokia's annual report, its NSN business made up almost half of the 2012 group's net revenues. Its commercial business is linked to the device business in the sense that NSN offers telecommunication infrastructure. While Nokia no longer needs licences for its device business, it is still dependent on third party licences for its NSN business.¹⁰⁹ Similarly, Nokia will continue to be active to offer solutions and licences to its digital mapping database and mobile map apps through its HERE business.

(254) Second, Nokia has invested considerably over the past years into R&D in order to generate innovations that are protected by patents, a characteristic that also differentiates it from a PAE.

(255) Third, any incentive Nokia will have to use its SEPs post-transaction to significantly impede effective competition will be limited because of the Commission's enforcement policy under Articles 101 and 102 TFEU with respect to FRAND commitments, and in particular the seeking of injunctions by SEP holders.¹¹⁰ In other

¹⁰⁹ Certain respondents claimed that the NSN business is largely insulated from infringement suits because (i) NSN sells its products directly to its customers (cellular carriers) and thus Nokia's potential licensee's do not have access to NSN's equipment, rendering investigating and bringing infringement suits difficult or impossible; and (ii) because infringement suits over infrastructure could disrupt carriers' operations, carries undoubtedly pressure suppliers to refrain from bringing them. However, [Nokia information on NSN] gives an indication that the NSN business is indeed exposed to patent infringement suits.

¹¹⁰ See Case COMP/M. 6381 *Google / Motorola Mobility*, Commission decision of 13 February 2012, paragraph 132. See also the preliminary view expressed by the Commission in Cases COMP/AT.39.985 - *Motorola* - Enforcement of GPRS standard essential patents, http://europa.eu/rapid/press-release_IP-13-406_en.htm and COMP/AT.39.939, *Samsung* -

words, Articles 101 and 102 TFEU constitute a further constraint on Nokia's post-transaction incentive to use its SEPs post-transaction to significantly impede effective competition.

- (256) Fourth, even if Nokia's current rates were not FRAND (and the Commission does not take position on that issue in the present decision), this would not be a merger-specific problem because Nokia has applied those FRAND rates prior to the merger. Moreover, since the proposed transaction does not alter the value of Nokia's SEPs portfolio, the royalty rate that is currently included in Nokia's cash only licenses, which, pursuant to Nokia's commitments to SSOs, should, at least in Nokia's view, be considered as FRAND, and may constitute a relevant benchmark for future licensing negotiations.
- (257) Fifth, Microsoft has confirmed to the Commission that, there are, and have been, no documents, discussions or agreements between Microsoft and Nokia dealing with Nokia's post-transaction conduct in relation to the licensing of its SEPs to third parties, including any possible direct or indirect involvement of Microsoft in Nokia's future decision-making in this regard and/or any Microsoft's direct or indirect entitlement in any of Nokia's future revenues from the licensing of its SEPs. Moreover, as Nokia also points out, after it exits the market as a smart mobile device supplier, it will be licensing its SEP patent portfolio in an entirely platform-neutral manner, having no incentives to favour any smart mobile manufacturer or mobile OS over another.
- (258) Finally, for completeness, the Commission notes that the concern regarding PAEs is not merger-specific since Nokia has been engaging in this strategy before the proposed transaction. Moreover, if one takes the view that the proposed transaction will reduce Nokia's exposure to third party patent claims, then it follows that Nokia's incentive to enter into agreements with PAEs may be reduced as a result of the proposed transaction.

4.2.3.4.3.4. Nokia's post-transaction incentives and ability to enforce its non-SEPs

- (259) Even if Nokia's post-transaction incentives and ability to enforce its non-SEPs were to change post-transaction, the effects of any such change will be limited for the following reasons.
- (260) First, despite the claim that Nokia's non-SEP portfolio is too extensive to allow effective designing-around in practice, the information gathered during the market investigation does not contain indications that any Nokia non-SEP (whether on a stand-alone basis or as a thicket) is indispensable for device manufacturers to compete on the market.
- (261) Second, Nokia's incentive to assert its non-SEPs is not merger-specific. Nokia has sought in the past, and currently seeks, injunctions against undertakings which allegedly infringed Nokia's non-SEPs. In doing so, Nokia has been characterized as aggressive by some competitors responding to the market investigation. Examples of litigation against

smart mobile device manufacturers involving some of Nokia's non-SEPs include HTC and Blackberry (formerly RIM).¹¹¹

(262) Third, the proposed transaction may also have pro-competitive effects regarding the licensing of Nokia's non-SEPs. This is due to the fact that while Nokia [information regarding Nokia's past licencing policy for its non-SEPS], it is currently "*exploring opportunities to broaden its licensing programme*" post-transaction. While the proposed transaction does not as such impact the value of Nokia's non-SEPs, what may change is that some of Nokia's non-SEPs may now be licensed to third parties in return for appropriate consideration.

(263) Finally, Microsoft has confirmed to the Commission that, there are, and have been, no documents, discussions or agreements between Microsoft and Nokia dealing with Nokia's post-transaction conduct in relation to the licensing of its non-SEPs to third parties, including any possible direct or indirect involvement of Microsoft in Nokia's future decision-making in this regard and/or any Microsoft's direct or indirect entitlement in any of Nokia's future revenues from the licensing of its non-SEPs.

5. CONCLUSION

(264) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

For the Commission
(Signed)
Joaquín ALMUNIA
Vice-President

¹¹¹ [Information regarding these litigations].