



EUROPEAN COMMISSION
DG Competition

Case M.10262 – FACEBOOK/ KUSTOMER

Only the English text is available and authentic.

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

Article 22(3)
Date: 12/05/2021



EUROPEAN COMMISSION

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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Autorità Garante della Concorrenza
e del Mercato
Piazza Giuseppe Verdi, 6a
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Italy

Subject: Case M.10262 – FACEBOOK / KUSTOMER
Request for referral by the *Autorità Garante della Concorrenza e del Mercato*, the Competition Authority of Italy, to the Commission pursuant to Article 22(1) of Council Regulation (EC) No. 139/2004¹ and Article 57 of the Agreement on the European Economic Area²

Ref.: Letter of the *Autorità Garante della Concorrenza e del Mercato*, the Competition Authority of Italy, of 28 April 2021

Dear Madam and Sir,

1. INTRODUCTION

- (1) By letter dated 2 April 2021, the Bundeswettbewerbsbehörde, the Federal Competition Authority of Austria ("the Austrian NCA"), formally requested the Commission to examine, pursuant to Article 22(3) of the Merger Regulation, a proposed transaction whereby Facebook, Inc. ("Facebook", U.S.) acquires sole control of Kustomer, Inc. ("Kustomer", U.S.). Facebook and Kustomer are together referred to as the "Parties"; the notified operation is hereinafter referred to as the "Transaction", and the Austrian NCA's request is referred to as "the Referral Request".

¹ OJ L 24, 29.01.2004, p.1 ("the Merger Regulation").

² OJ L 1, 3.1.1994, p.3 ("the EEA Agreement").

- (2) Pursuant to Article 22(1) of the Merger Regulation, one or more Member States may request the Commission to examine any concentration within the meaning of Article 3 of the Merger Regulation, that does not have a Union dimension pursuant to Article 1 of that Regulation, but which (i) affects trade between Member States and (ii) threatens to significantly affect competition within the territory of the Member State or States making the request. Such a request must be transmitted within 15 working days of the date of the notification of the concentration, or, if notification is not required, otherwise made known, to the requesting Member State. Pursuant to Article 22(2) of the Merger Regulation, any other Member State may join the initial request within a period of 15 working days of being informed by the Commission of the initial request. Pursuant to Article 6(3) of Protocol 24 to the EEA Agreement, any EFTA State may join the request within a period of 15 working days from the day on which the Commission informed the EFTA Surveillance Authority of the initial request.

2. PROCEDURE

- (3) In the present case, the Austrian NCA received the notification of the Transaction on 31 March 2021 (the "Notification").
- (4) The Austrian NCA submitted the Referral Request pursuant to Article 22(1) of the Merger Regulation to the Commission on 2 April 2021, which was deemed to have been received on the following working day, 6 April 2021.
- (5) In accordance with Article 22(2) of the Merger Regulation, the Commission informed the competent authorities of the other Member States and the EFTA Surveillance Authority of the Referral Request received on 7 April 2021.
- (6) On 19 April 2021, the *Samkeppniseftirlitið*, the Icelandic Competition Authority (the "Icelandic NCA"), joined the Referral Request. On 26 April 2021, the *Autoriteit Consument & Markt*, the Dutch Competition Authority (the "Dutch NCA"), and the *Autorité de la concurrence*, the French Competition Authority (the "French NCA") joined the Referral Request. On 28 April 2021, the *Autorité belge de la Concurrence*, the Belgian Competition Authority (the "Belgian NCA"), the Commission for Protection of Competition (*Комисията за защита на конкуренцията*), the Bulgarian Competition Authority (the "Bulgarian NCA"), the *Autorità Garante della Concorrenza e del Mercato*, the Italian Competition Authority (the "Italian NCA"), the *Competition and Consumer Protection Commission*, the Irish Competition Authority (the "Irish NCA"), the *Autoridade da Concorrência*, the Portuguese Competition Authority (the "Portuguese NCA"), and the *Consiliul Concurenței*, the Romanian Competition Authority (the "Romanian NCA") joined the Referral Request.
- (7) The Belgian NCA, the Bulgarian NCA, the Dutch NCA, the French NCA, the Icelandic NCA, the Italian NCA, the Irish NCA, the Portuguese NCA and the Romanian NCA are collectively referred to as, the "Joining NCAs".
- (8) On 4 May 2021, the Austrian NCA agreed to receive any decision in this case in English. In their requests to join the Referral Request, the Belgian NCA (by letter dated 28 April 2021) and the Dutch NCA (by letter dated 26 April 2021) agreed to receive any decision in this case in English, as did the Bulgarian NCA (by letter

dated 10 May 2021), the French NCA (by letter dated 4 May 2021), the Italian NCA (by letter dated 4 May 2021), the Portuguese NCA (by letter dated 3 May 2021) and the Romanian NCA (by letter dated 7 May 2021).³

3. THE PARTIES

- (9) **Facebook** was founded in 2004 and is headquartered in the U.S. It provides various websites and applications for mobile devices offering social networking, consumer communications and photo and video-sharing functionalities. These include Facebook, Messenger, Instagram and WhatsApp. Facebook offers most of its services at no cost to users. Facebook's primary revenue-generating activity is offering ads space and related services (such as tools for designing, and measuring the effectiveness of, ads campaigns) to third parties, which currently accounts for the vast majority (approximately [90-100]%) of its annual revenues globally.
- (10) Facebook's FY 2020 worldwide revenues were EUR 75.4 billion, of which EUR [...] or [...] % were generated in the EEA (excluding the UK).
- (11) **Kustomer** was founded in 2015 and is headquartered in the U.S. It offers a Software as a Service ("SaaS") customer relationship management ("CRM") software specialising in customer service. It is designed to help agents in a company's customer service function manage communications with consumers, e.g. when a consumer contacts the business with a product enquiry, in connection with a late delivery or a faulty product or return. Kustomer displays all interactions that a consumer has had with the business in a single timeline view, including the consumer's purchase history, refunds, complaints and all other communications. Kustomer's CRM software integrates with a wide range of business-to-consumer ("B2C") communication channels and supports agent communications with consumers through communication channels including phone, email, webchat, SMS, Messenger, WhatsApp, Instagram and Twitter.
- (12) Kustomer's FY 2020 worldwide revenues are EUR [...], of which EUR [...] or [...] % were generated in the EEA (excluding the UK). Its worldwide and EEA revenues are expected to be EUR [...] and EUR [...] respectively in FY 2021.

4. THE CONCENTRATION

- (13) The Transaction consists in the acquisition of sole control by Facebook over Kustomer, pursuant to a merger agreement dated 27 November 2020, [Transaction structure and purchase price] in cash. Therefore, the Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.
- (14) However, as Kustomer has revenues of less than EUR 100 million in the EEA, the Transaction does not have a Union dimension within the meaning of Article 1 of the Merger Regulation.

³ There is no legal obligation in the EEA Agreement for the Commission to address a decision in the language(s) of the EFTA States, so no language waiver was required from the Icelandic NCA. In any event, the Icelandic NCA confirmed that that a decision in the present case may be written in English.

5. ASSESSMENT OF THE REFERRAL REQUEST

- (15) In order for a referral to be made by a Member State, one procedural precondition and two substantive conditions must be fulfilled pursuant to Article 22(1) of the Merger Regulation. As to the procedural precondition, the referral request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned. As to the substantive conditions, the concentration must: (i) affect trade between Member States; and (ii) threaten to significantly affect competition within the territory of the Member State(s) making the request.⁴ If these requirements are met, the Commission may decide to examine the concentration.

5.1. Procedural precondition

- (16) The Austrian NCA received the Notification on 31 March 2021 and made the Referral Request on 2 April 2021, which was deemed to have been received by the Commission on 6 April 2021, which is one working day from the date of the Notification.⁵ Therefore, the Referral Request was made within the time limit of Article 22(1), second indent, of the Merger Regulation.
- (17) Moreover, the Commission notes that the Dutch NCA and the French NCA joined the Referral Request on 26 April 2021, and the Bulgarian NCA, the Belgian NCA, the Italian NCA, the Irish NCA, the Portuguese NCA and the Romanian NCA, joined the Referral Request on 28 April 2021, which is within a period of 15 working days of being informed by the Commission of the Referral Request (on 7 April 2021), thus within the time limit of Article 22(2), second indent, of the Merger Regulation.
- (18) The Icelandic NCA joined the Referral Request on 19 April 2021, which is within a period of 15 working days of the date on which the EFTA Surveillance Authority was informed by the Commission of the Referral Request (on 7 April 2021), thus within the time limit of Article 22(2), second indent, of the Merger Regulation in conjunction with Article 13 of Protocol 24 to the EEA Agreement.

5.2. Substantive criteria

5.2.1. *The Transaction affects trade between Member States*

- (19) According to paragraph 43 of the Referral Notice, the first criterion is met when the concentration is liable to have some discernible influence on the pattern of trade between Member States.
- (20) The Austrian NCA argues that the Transaction is likely to affect trade between Member States, because, first, the relevant markets that may be impacted by the Transaction are likely to be defined as either at least EEA-wide or as a series of national markets which may be impacted by the Transaction in a similar way. Second, the Austrian NCA notes that the Parties are active in several countries

⁴ See also Commission Notice on Case Referral in respect of Concentrations (OJ C56, 05.03.2005, p.2, "the Referral Notice"), paragraphs 42-44.

⁵ 1 April 2021, 2 April 2021 and 5 April 2021 were public holidays for the Commission.

throughout the EEA. Facebook has a commercial presence in all Member States, and Kustomer's—currently relatively limited—business in the EEA, which accounts for c. [...] % of its revenues, is expected to expand and barriers to expansion appear to be low (especially with Facebook's support).⁶ The Joining NCAs agree with these views, and made similar points explicitly in their requests to join the Referral Request.⁷

- (21) In addition, the Commission notes that Facebook has significant turnover in all EEA countries (its lowest national turnover for 2020 still amounts to more than EUR [...] million amongst EU Member States and more than EUR [...] million amongst EFTA States). Facebook has offices in Belgium, Czechia, Denmark, France, Germany, Ireland, Italy, the Netherlands, Poland, Spain and Sweden.⁸ Finally, Facebook owns and leases several data centres within the EEA. Kustomer had turnover in [number] EEA countries in 2020 ([Revenue information]). Kustomer also has an office and personnel in Spain through its subsidiary Reply, and in December 2019 it launched its first EEA-based data centre in Ireland, and announced plans to grow its sales and customer experience teams in Europe in view of its overall expansion plans and anticipated increasing demand.⁹
- (22) On the basis of the Notification, the Commission notes that the relevant markets for the assessment of the Transaction may include the provision of CRM software, the provision of B2C communications, and the provision of online advertising services. Each of those markets is assessed in turn below.
- (23) **CRM software.** The Commission has, in previous merger decisions, considered there to be a market for the provision of CRM software.¹⁰ Previous cases have discussed, but left open, the question of whether that market should be further segmented on the basis of different (i) functionalities (e.g. customer service, sales force automation, marketing automation), (ii) modes of deployment and (iii) customer size.¹¹ In the Notification, the Parties argued the exact market definition can be left open.
- (24) With respect to the geographic market definition of the CRM software market and its possible segments, previous Commission merger decisions have concluded they

⁶ Letter of the Austrian NCA dated 2 April 2021.

⁷ Letter of the Belgian NCA dated 28 April 2021; letter of the Bulgarian NCA dated 28 April 2021; letter of the French NCA dated 26 April 2021; letter of the Icelandic NCA dated 19 April 2021; letter of the Irish NCA dated 18 April 2021; letter of the Italian NCA dated 28 April 2021; letter of the Dutch NCA dated 26 April 2021; letter of the Portuguese NCA dated 28 April 2021; letter of the Romanian NCA dated 28 April 2021.

⁸ See Facebook 10-K report, 2020, available at: <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/4dd7fa7f-1a51-4ed9-b9df-7f42cc3321eb.pdf>.

⁹ See <https://www.kustomer.com/blog/first-eu-data-center/>.

¹⁰ Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 36-50; Commission decision of 19 December 2014 in case M.7337 – *IMS Health/Cegedim Business*, paragraphs 91-92; Commission decision of 29 August 2014 in case M.7334 – *Oracle/Micros*, paragraph 9; Commission decision of 20 July 2010 in case M.5904 – *SAP/Sybase*, paragraph 21; Commission decision of 4 January 2008 in case M.4987 – *IBM/Cognos*, paragraphs 7-9; Commission decision of 27 November 2007 in case M.4944 – *SAP/Business Objects*, paragraph 7; Commission decision of 22 December 2005 in case M.3978 – *Oracle/Siebel*, paragraphs 11-16.

¹¹ *Idem*.

should be defined EEA-wide, if not worldwide, but ultimately left the precise scope open.¹² In the Notification, the Parties consider that the geographic market for CRM software is worldwide in scope.

- (25) **B2C communications services.** The Commission has not previously considered in a merger decision the provision of B2C communications services specifically. However, the Commission has considered related markets in a number of previous merger decisions.
- (26) The Commission has considered that there are distinct markets for consumer communication services and enterprise communication services (which are used by companies for business purposes).¹³ In consumer communications, the Commission has considered it appropriate to further divide the market by platform, but has otherwise left open whether the market should be further divided by operating software or functionality.¹⁴ In the Notification, the Parties argued that the exact market definition can be left open.
- (27) From a geographic perspective, previous Commission decisions have recognised that the markets for consumer communication services and enterprise communication services are at least EEA wide.¹⁵ In the Notification, the Parties consider that the geographic market for B2C communication services is worldwide in scope.
- (28) **Online advertising.** In previous merger decisions, the Commission considered the market for online advertising to be separate from offline advertising. It also considered possible further segmentations between online search and non-search (i.e. display) advertising, on the basis of the platform (PC versus mobile), between online display ads on social networks or off social networks, or between online display video and non-video advertising.¹⁶ Following the *Google AdSense* decision,¹⁷ the Commission concluded, in *Google/Fitbit*, that there were separate relevant product markets for the supply of online search advertising services (and potentially segments) on the one hand, and the supply of online display advertising services (and potential segments) on the other hand.¹⁸ In the Notification, the Parties consider that the relevant frame of reference includes all ads services (i.e. including both

¹² Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 52-56; Commission decision of 19 December 2014 in case M.7337 – *IMS Health/Cegecim Business*, paragraph 96; Commission decision of 4 January 2008 in case M.4987 – *IBM/Cognos*, paragraph 16; Commission decision of 22 December 2005 in case M.3978 – *Oracle/Siebel*, paragraphs 18-19.

¹³ Commission decision of 3 November 2014 in case M.7217 – *Facebook/WhatsApp*, paragraph 20; Commission decision of 4 December 2013 in case M.7047 – *Microsoft/Nokia*, paragraphs 43-45; Commission decision of 7 October 2011 in case M.6281 – *Microsoft/Skype*, paragraph 17.

¹⁴ Commission decision of 3 November 2014 in case M.7217 – *Facebook/WhatsApp*, paragraphs 21-22.

¹⁵ Commission decision of 3 November 2014 in case M.7217 – *Facebook/WhatsApp*, paragraph 44; Commission decision of 4 December 2013 in case M.7047 – *Microsoft/Nokia*, paragraph 81; Commission decision of 7 October 2011 in case M.6281 – *Microsoft/Skype*, paragraphs 66-68.

¹⁶ Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, paragraphs 148-155; Commission decision of 6 September 2018 in case M.8788 – *Apple/Shazam*, paragraphs 133-135; Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 159-161; Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraphs 74-79.

¹⁷ Commission decision of 20 March 2019 in case AT.40411 – *Google AdSense*, paragraphs 121-183.

¹⁸ Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, paragraph 155.

online and offline advertising), but did not conclude on the appropriate frame of reference.

- (29) With reference to the geographic scope of the online advertising market and its possible segments, the Commission found in previous cases that they should be defined as national in scope or following linguistic borders within the EEA.¹⁹ Following the *Google AdSense* decision,²⁰ the Commission concluded, in *Google/Fitbit*, that the geographic scope of the online advertising market and its possible segments is national or follows linguistic borders within the EEA.²¹
- (30) In the Notification, Facebook argues that although some advertising demand may be national, the geographic scope of the online advertising market is global on the basis that competitive conditions do not vary significantly across geographic areas, but noted that the exact scope of the market can be left open.
- (31) In this regard, the Commission notes that, as the scope of the relevant market and its possible sub-segments may be not merely national, but could be defined as following linguistic borders, it is likely that any effect of the Transaction in the market for online advertising would not be limited to Austria, but would extend to other neighbouring countries or regions within countries where German is a spoken language, such as Germany, Liechtenstein and some areas of Luxembourg, Belgium and Italy. This may similarly apply to the countries of Joining NCAs whose official language is spoken outside of that country. Regardless of the fact that the market for online ads services and its possible sub-segments would be national in scope or following linguistic borders within the EEA, it should be observed that the Transaction would affect competition on those markets in a similar way across the EEA.
- (32) **Conclusion.** In light of the foregoing, in particular the facts that many of the relevant markets impacted by the Transaction may be defined as broader than national in geographic scope, that the Parties are active in several countries throughout the EEA, and that [Business plans of Kustomer], the Commission considers that the requirement that the Transaction affects trade between Member States is met, *i.e.*, the Transaction “*is liable to have some discernible influence on the pattern of trade between Member States*”.²²

5.2.2. *The Transaction threatens to significantly affect competition within the territory of the Member State making the request*

- (33) According to paragraph 44 of the Referral Notice, the second criterion is met when, on the basis of a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and therefore deserves close scrutiny. Such preliminary indications may be in the nature of *prima facie* evidence

¹⁹ Commission decision of 6 September 2018 in case M.8788 – *Apple/Shazam*, paragraphs 138-140; Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 163-164; Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraphs 44 and 83.

²⁰ Commission decision of 20 March 2019 in case AT.40411 – *Google AdSense*, paragraphs 203-217.

²¹ Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, paragraphs 158-160.

²² Referral Notice, paragraph 43.

of such a possible significant adverse impact and they are without prejudice to the outcome of a full investigation.

- (34) As mentioned above, Facebook is active in the supply of both B2C communication services and online advertising services. Kustomer provides CRM software, and collects and processes data, relating to customer interactions and transactions (that occur outside Facebook), from its business customers. B2C communications can be an input for the supply of CRM software in case CRM software providers obtain application programming interface (“API”)²³ access to B2C communication channels to help businesses manage communications with consumers by unifying all interactions (phone, email, webchat, SMS, Messenger, WhatsApp, Instagram, Twitter, etc.) into a single tool.
- (35) The Austrian NCA and the Joining NCAs have identified at least three types of conduct through which the Transaction threatens to significantly affect competition. First, through the potential input foreclosure of Kustomer’s CRM software competitors by restricting access to Facebook’s B2C communication services. Second, through the potential customer foreclosure of Facebook’s B2C communication services competitors by restricting access to Kustomer’s CRM software. Third, through the potential strengthening of Facebook’s position in the supply of online display advertising by using Kustomer data to improve its offering.
- (36) **Foreclosure of competing CRM software providers.** The Referral Request explains that the Transaction threatens to lead to the potential input foreclosure of competing CRM software providers by restricting access to Facebook’s B2C communication services.²⁴ The Joining NCAs agree with this view, and made this point explicitly in their requests to join the Referral Request.²⁵
- (37) A preliminary analysis of the information contained in the Notification and initial information provided by the Parties indicates that there is a real risk that the Transaction could lead to Facebook restricting or degrading access by Kustomer’s competitors in the CRM software market to Facebook’s B2C communication services (e.g., WhatsApp and Instagram). This in turn could make such rival CRM solutions less attractive to business users leading to potential foreclosure.
- (38) It will need to be investigated whether the combined entity would have the ability and incentive to engage in input foreclosure to the detriment of Kustomer’s competitors downstream by degrading or restricting access to Facebook’s APIs to its B2C communications services. However, based on *prima facie* evidence, it is already noted that Facebook may have a significant degree of market power in a

²³ An API is a particular set of rules and specifications that a software program follows in order to access and make use of the services and resources provided by another software program or hardware that also implements that API. In essence, APIs allow software programs and hardware, or different software programs, to communicate with each other.

²⁴ Letter of the Austrian NCA dated 2 April 2021.

²⁵ Letter of the Belgian NCA dated 28 April 2021; letter of the Bulgarian NCA dated 28 April 2021; letter of the French NCA dated 26 April 2021; letter of the Icelandic NCA dated 16 April 2021; letter of the Irish NCA dated 18 April 2021; letter of the Italian NCA dated 28 April 2021; letter of the Dutch NCA dated 26 April 2021; letter of the Portuguese NCA dated 28 April 2021; letter of the Romanian NCA dated 28 April 2021.

potential market for B2C communications services and/or potential segments of such a market, both in the EEA and worldwide. First, whilst, according to the information provided by Facebook in the Notification, it has a relatively small market share in the overall B2C communications market (around [0-5]% in the EEA and [5-10]% worldwide in 2020), its market share is approximately [40-50]% and [40-50]% in the potential segment for B2C messaging services, in the EEA and worldwide respectively.²⁶ Second, in any case, Facebook offers important messaging channels that have a high market penetration among consumers in the EEA.²⁷ Those messaging channels may therefore be a particularly important input for CRM software providers, regardless of Facebook's share in an overall market for B2C communications services.

- (39) In this context, the Commission considers that *prima facie* there is a real risk of potential vertical foreclosure of competing CRM software providers by restricting access to Facebook's B2C communication services.
- (40) **Foreclosure of competing B2C communication services providers.** Similarly, the Referral Request explains that the Transaction threatens to lead to the potential customer foreclosure of competing B2C communication services providers by restricting access to Kustomer's CRM software.²⁸ The Joining NCAs agree with this view, and multiple Joining NCAs explicitly made this point in their requests to join the Referral Request.²⁹
- (41) It will need to be investigated whether the combined entity would have the ability and incentive to engage in customer foreclosure to the detriment of Facebook's competitors in a potential upstream market for B2C communication services (or sub-segments of such a market) by degrading or restricting access to Kustomer's CRM software (which, as mentioned above, can use B2C communications as an input). Whilst preliminary evidence in the Notification indicates that Kustomer's market share in the overall CRM software market and the possible customer service CRM software segment is limited, the merged entity may be found to have a significant degree of market power in a potential sub-segment of the CRM software market. The precise scope of the market for CRM software, and of potential sub-segments of such a market, will need to be investigated further.
- (42) **Strengthen Facebook's position in the supply of online display advertising (and potential sub-segments) through access to additional data.** The Austrian NCA submits that the Transaction could potentially strengthen Facebook's position in the supply of online display advertising by using Kustomer data to improve its

²⁶ There are currently no Commission precedents on the product market definition for B2C communications. However, the Commission has considered related markets in a number of previous merger decisions. See paragraphs 26-27 above.

²⁷ For example, Commission decision of 3 October 2014 in Case M.7217 – *Facebook/WhatsApp*, paragraph 38. The Commission notes that "*WhatsApp is widespread in the EEA*".

²⁸ Letter of the Austrian NCA dated 2 April 2021.

²⁹ Letter of the Belgian NCA dated 28 April 2021; letter of the Bulgarian NCA dated 28 April 2021; letter of the French NCA dated 26 April 2021; letter of the Icelandic NCA dated 16 April 2021; letter of the Irish NCA dated 18 April 2021; letter of the Romanian NCA dated 28 April 2021.

offering.³⁰ The Joining NCAs agree with this view, and multiple Joining NCAs explicitly made this point in their requests to join the Referral Request.³¹

- (43) A preliminary analysis of the initial information indicates that there is a real risk that the Transaction could lead to Facebook strengthening its ([Market share information]) position in a series of online display advertising markets across the EEA (and sub-segments of those markets). By using Kustomer data to improve its offering (e.g. improved ad targeting), which could be difficult for rivals (including other social media platforms) to match, the Transaction could raise barriers to entry and expansion for competitors for online display advertising services, and thereby strengthen Facebook's ([Market share information]) position. This would occur to the detriment of advertisers, who may ultimately face higher prices and have less choice. The increment and relevance of Kustomer's data will require further investigation.
- (44) Facebook has provided the following share data in relation to its activities in online advertising services:

Table 1: Facebook shares of supply of online ads services

Geography	2018	2019	2020
World	[10-20]%	[20-30]%	[20-30]%
EEA	[20-30]%	[20-30]%	[30-40]%
Austria	[20-30]%	[30-40]%	[40-50]%
Belgium	[20-30]%	[20-30]%	[30-40]%
Czech Republic	[10-20]%	[20-30]%	[30-40]%
Denmark	[20-30]%	[30-40]%	[40-50]%
Finland	[20-30]%	[30-40]%	[40-50]%
France	[20-30]%	[20-30]%	[30-40]%
Germany	[20-30]%	[20-30]%	[30-40]%
Hungary	[30-40]%	[40-50]%	[50-60]%
Ireland	[20-30]%	[20-30]%	[30-40]%
Italy	[30-40]%	[30-40]%	[40-50]%
Netherlands	[20-30]%	[20-30]%	[30-40]%
Norway	[30-40]%	[30-40]%	[30-40]%
Poland	[20-30]%	[30-40]%	[50-60]%

³⁰ Letter of the Austrian NCA dated 2 April 2021.

³¹ Letter of the Belgian NCA dated 28 April 2021; letter of the Bulgarian NCA dated 28 April 2021; letter of the French NCA dated 26 April 2021; letter of the Irish NCA dated 18 April 2021; letter of the Italian NCA dated 28 April 2021; letter of the Dutch NCA dated 26 April 2021; letter of the Portuguese NCA dated 28 April 2021; letter of the Romanian NCA dated 28 April 2021.

Geography	2018	2019	2020
Spain	[30-40]%	[30-40]%	[40-50]%
Sweden	[20-30]%	[20-30]%	[20-30]%

Source: Facebook's data; International Data Corporation (IDC), *Worldwide Digital Advertising Market Model, Q2 2020*.

- (45) The above table points to consistently high and increasing shares in online advertising services at worldwide and EEA level, and in each of the Member States for which Facebook was able to provide data. In particular, shares in online advertising services are above 30% in the EEA and are above 40% (and even 50%) in multiple Member States in 2020. While the Commission had requested that Facebook provides market shares separately for each EU Member State and EEA country, Facebook indicated that it was only in a position to estimate market shares for the fifteen EEA countries in the above table due to data availability issues.
- (46) In order to more accurately assess whether the Transaction may threaten to significantly affect competition within the territories of the Member States, the Commission has followed up with Facebook to provide further data on its advertising revenues with a view to carrying out a market reconstruction exercise to estimate Facebook's national shares in (i) a potential market for online non-search (i.e., display) advertising and (ii) a potential sub-market for online display advertising on social networks. Facebook is likely to have a significant ([Market share information]) position in these potential sub-markets.
- (47) In this context, the Commission considers that *prima facie* there is a real risk of potential strengthening of Facebook's position in the supply of online display advertising by using Kustomer data (i.e. data accumulation).
- (48) **Conclusion.** In light of the foregoing, on balance, the Commission considers that the requirement, that the Transaction threatens to significantly affect competition within the territory of the Member State making the request, is met.

5.3. Appropriateness of the referral

- (49) Pursuant to paragraph 45 of the Referral Notice, referrals of concentrations already notified should normally be limited to those cases which appear to present a real risk of negative effects on competition and trade between Member States and where it appears that these would be best addressed at the Community level.
- (50) The first category of cases normally most appropriate for referral under Article 22 of the Merger Regulation are those cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets. The second category of cases normally most appropriate for referral under Article 22 of the Merger Regulation are cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of Member States, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is

considered desirable, and where the main economic impact of the concentration is connected to such markets.

- (51) In the present case, the Transaction threatens to significantly affect competition in the market(s) for CRM software, B2C communications and/or online advertising services (and potential sub-segments of such markets).
- (52) First, with respect to the markets for CRM software and B2C communications (and potential sub-segments), it appears likely from the Notification and the Commission's previous decisional practice that an EEA-wide (or wider) geographic market definition may be retained in the present case, which means the Transaction would fall in the first category of cases most appropriate for a referral pursuant to paragraph 45 of the Referral Notice.
- (53) Second, any effect of the Transaction in the market for online advertising (and potential sub-segments) would not be limited to Austria (and the Joining NCAs), but would extend to other neighbouring countries or regions within countries, where German is a spoken language, such as Germany and some areas of Luxembourg, Belgium and Italy. Hence, the Transaction falls under the first category of cases referred to in paragraph 45 of the Referral Notice. This would apply similarly to the countries of Joining NCAs whose official language is spoken outside of that country. If, however, the market for online advertising (and potential sub-segments) were to be considered to be national in scope, the Transaction would likely give rise to similar concerns in the respective national markets of several Member States. Indeed, in the Notification, the Parties argue that competitive conditions in online ads services do not vary significantly across geographic areas. In such a scenario, an assessment by the Commission would ensure a coherent treatment as set out in paragraph 45 of the Referral Notice and the Transaction would correspond to the second category of cases normally most appropriate for referral under Article 22 of the Merger Regulation.
- (54) Third, the Commission notes that in addition to Austria, eight other Member States and one EFTA State have joined the Referral Request and have raised issues as to the potential problematic nature of the effects of the Transaction. In this context, a review of the Transaction by the Commission is deemed to be appropriate to ensure a consistent assessment of the issues at stake.
- (55) Finally, in recent years, the Commission has acquired considerable expertise in the assessment of transactions in fast-moving digital markets, including in some of the markets where the Transaction is likely to raise competition concerns.³² These include, for example, foreclosure of CRM software rivals through denial or degradation of access to software applications, or the use of data to improve the merged entity's position in online advertising.
- (56) Therefore, it is appropriate to refer the Transaction to the Commission pursuant to Article 22 of the Merger Regulation.

³² See, most recently, Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*; Commission decision of 6 September 2018 in case M.8788 – *Apple/Shazam*; Commission decision of 6 December 2016 in Case M.8124 – *Microsoft/LinkedIn*; Commission decision of 3 October 2014 in Case M.7217 – *Facebook/WhatsApp*.

6. CONCLUSION

- (57) For the abovementioned reasons, the Commission has decided to examine the Transaction. This decision is based on Article 22(3) of the Merger Regulation and Article 57 of the EEA Agreement.

For Commission

(Signed)
Margrethe VESTAGER
Member of the Commission