



EUROPEAN COMMISSION

DG Competition

***Case M.8788 -APPLE / SHAZAM***

Only the English text is available and authentic.

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

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Article 22

Date: 06 February 2018



## EUROPEAN COMMISSION

Brussels, 6.2.2018  
C(2018) 823 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

**To the  
Samkeppniseftirlitið**

**Subject: Case M.8788 – Apple/Shazam  
Request for referral by the Samkeppniseftirlitið, the Competent  
Competition Authority of Iceland, to the Commission pursuant to  
Article 22(1) of Council Regulation (EC) No. 139/2004<sup>1</sup> and Article 57  
of the Agreement on the European Economic Area<sup>2</sup>**

Ref.: Letter of the of the Samkeppniseftirlitið, the Competition Authority of Iceland, of  
1 February 2018

Dear Madam and Sir,

### 1. INTRODUCTION

- (1) By letter of 21 December 2017, 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 Apple, Inc. ("Apple") acquires sole control of Shazam Entertainment Ltd. ("Shazam"). Shazam and Apple 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".
- (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

<sup>1</sup> OJ L 24, 29.01.2004, p.1 ("the Merger Regulation").

<sup>2</sup> OJ L 1, 3.1.1994, p.3 ("the EEA Agreement").

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.

- (3) In the present case, the Austrian NCA received the notification of the Transaction on 12 December 2017 (the "Notification").
- (4) The Commission received the Referral Request pursuant to Article 22(1) of the Merger Regulation on 21 December 2017.
- (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, respectively, on 22 December 2017 and 19 January 2018.
- (6) On 15 January 2018, the Austrian NCA agreed to receive any decision in this case in English.
- (7) On 19 January 2018, the Comisión Nacional de los Mercados y la Competencia, the Spanish Competition Authority (the "Spanish NCA") joined the Referral Request. On 22 January 2018, the Autorità Garante della Concorrenza e del Mercato, the Italian Competition Authority (the "Italian NCA"), and the Konkurrensvirket, the Swedish Competition Authority (the "Swedish NCA") also joined the Referral Request. On 23 January 2018, the Autorité de la Concurrence, the French Competition Authority (the "French NCA"), joined the Referral Request.
- (8) On 31 January 2018 and on 1 February 2018, respectively the Konkurransetilsynet, the Norwegian Competition Authority (the "Norwegian NCA"), and the Samkeppniseftirlitið, the Icelandic Competition Authority (the "Icelandic NCA"), joined the Referral Request. The Norwegian NCA and the Icelandic NCA together with the French NCA, the Spanish NCA, the Italian NCA and Swedish NCA are collectively referred as, the "Joining NCAs".
- (9) In its request to join the Referral Request the Swedish NCA agreed to receive any decision in this case in English, and so did the French NCA and the Italian NCA by letter dated, respectively, 31 January 2018 and 2 February 2018. On 30

January 2018, the Spanish NCA agreed to receive any decision in this case in English, and within a reasonable period a version of such documents in Spanish.<sup>3</sup>

## 2. THE PARTIES

- (10) **Apple** designs, manufactures and sells mobile communication and media devices (such as the "iPhone", the "iPad", the "Apple TV"), portable digital music players (the "iPod") and personal computers ("Mac"). It also sells a variety of related software, including the PC operating system ("OS") "MAC OS X", the mobile OS "iOS", virtual assistant solutions ("SIRI"), services, peripherals, networking solutions, and third-party digital content and apps. Apple also sells and delivers digital content online through the "iTunes Store", the "App Store", "iBookstore" and "Mac App Store", and offers the music and video streaming service "Apple Music".
- (11) In its last audited financial year (2016/17), Apple generated a consolidated worldwide turnover of EUR 206.3 billion, of which approximately EUR [...] in the EU.
- (12) **Shazam** is a developer and distributor of music recognition applications ("apps") for smartphones, tablets and PCs.<sup>4</sup> It generates revenues from (i) the display of online advertising, (ii) paid partnership, (iii) commissions earned on referrals of users to music streaming and download services, such as Apple Music and Spotify, and (iv) music data and analytics services.
- (13) Shazam's worldwide turnover in 2016 amounted to EUR 45.2 million, of which approximately EUR [...] in the EU.

## 3. THE CONCENTRATION

- (14) The Transaction consists in the acquisition of sole control by Apple over Shazam. Therefore, it constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.
- (15) However, as Shazam has revenues of less than EUR 100 million, the Transaction does not have a Union dimension within the meaning of Article 1 of the Merger Regulation.

## 4. ASSESSMENT OF THE REFERRAL REQUEST

- (16) 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 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 substantial conditions, the concentration must: (i) affect trade between Member States; and (ii) threaten to significantly affect

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<sup>3</sup> As there is no legal obligation in the EEA Agreement for the Commission to address a decision in the language(s) of the EFTA States, no language waiver was required.

<sup>4</sup> It also offers visual recognition services, which, however, at present have no market relevance.

competition within the territory of the Member State(s) making the request.<sup>5</sup> If these requirements are met, the Commission may decide to examine the concentration.

- (17) Likewise, according to Article 6(3) of Protocol 24 to the EEA Agreement, one or more EFTA States may join a referral request where the concentration (i) affects trade between one or more EU Member States and one or more EFTA States and (ii) threatens to significantly affect competition within the territory of the EFTA States joining the request. Pursuant to Article 13 of Protocol 24, the time limit for EFTA States to join a request starts upon receipt of the relevant document by the EFTA Surveillance Authority.

#### **4.1. Procedural precondition**

- (18) The Austrian NCA received the Notification on 12 December 2017 and made the Referral Request on 21 December 2017, that is seven working days from the date of the Notification. Therefore, the Referral Request was made within the time limit of Article 22(1), second indent, of the Merger Regulation.
- (19) Moreover, the Commission notes that the Spanish NCA, the Italian NCA, the Swedish NCA and the French NCA, joined the Referral Request, respectively, on 19 January 2018, 22 January 2018 and 23 January 2018, that is within a period of 15 working days of being informed by the Commission of the Referral Request (on 22 December 2017), thus within the time limit of Article 22(2), second indent, of the Merger Regulation.
- (20) The Norwegian NCA and the Icelandic NCA joined the Referral Request on 31 January 2018 and 1 February 2018, respectively, that 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 19 January 2018), 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.

#### **4.2. Substantive criteria**

##### *4.2.1. The Transaction affects trade between one or more EU Member States and one or more EFTA States*

- (21) According to paragraph 43 of the Referral Notice, the first substantive criterion is met when the concentration is likely to have some discernible influence on the pattern of trade between Member States.
- (22) The Austrian NCA argues that the Transaction is likely to affect trade between Member States because the relevant markets for the assessments of its effects are to be defined as at least EEA-wide and because the Parties are active throughout the EEA. The Joining NCAs agree with that view.

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<sup>5</sup> See also Commission Notice on Case Referral in respect of Concentrations (OJ C56, 05.03.2005, p.2, "the Referral Notice"), paragraphs 42-44.

- (23) On the basis of the Notification, the Commission notes that the relevant markets for the assessment of the Transaction are the provision of music recognition services, the provision of digital music distribution services, the supply of OSs and the provision of online advertising services. Each of those markets is assessed in turn in the following.
- (24) **Music recognition services.** In previous decisions, the Commission has not specifically assessed music recognition services or apps.
- (25) In the Notification, Apple submits that the market for music recognition services encompasses, not only stand-alone apps, such as Shazam, but also web-based solutions offering music recognition, as well as other software solutions encompassing the music recognition functionality. According to Apple, the market should not be further segmented by functionality, platform or OS, but its definition can be ultimately left open.
- (26) Concerning the geographic scope of the market, Apple submits that it is at least EEA-wide, if not worldwide, as the same music recognition services are offered throughout the world over the Internet and there are no differences, in terms of offering in different regions or countries. Language or feature customization is minor and normally add-ons are offered to meet local needs.
- (27) The Commission notes that Apple's position is in line with the one expressed by the Austrian NCA. Moreover, an EEA-wide scope of the market appears to be in line with the geographic market definition identified in the Commission's past decisional practice for software markets or apps where there was a lack of legal or technical barriers restricting the use of apps and there were no differences in terms of quality, price and features and global distribution by suppliers with limited differentiation in the EEA.<sup>6</sup>
- (28) **Digital music distribution services.** In its previous decisional practice, the Commission analysed the market for digital music distribution and, while leaving the market definition open, found evidence that the boundaries between streaming and downloading activities were becoming blurred.<sup>7</sup> As regards the geographic scope of the market, while the market investigation in one case provided strong indications that the market for digital music distribution could be defined as national in scope,<sup>8</sup> the geographical scope has always been left open by the Commission.<sup>9</sup>
- (29) In the Notification, Apple submits that the geographic scope of the market can be left open.

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<sup>6</sup> See Commission decision of 6 December 2016 in Case M.8124 – *Microsoft/LinkedIn*, paragraphs 84-86, Commission decision of 3 October 2014 in Case No M.7217 – *Facebook/WhatsApp*, paragraph 36-44.

<sup>7</sup> See Commission decision of 25 July 2014 in Case M.7290 - *Apple/Beats*, paragraphs 18-19.

<sup>8</sup> Previous, see Commission decision of 21 September 2012 Case M.6458 – *Universal Music Group/EMI Music*, recitals 234-235.

<sup>9</sup> See Commission decision of 25 July 2014 in Case M.7290 - *Apple/Beats*, paragraphs 20-21.

- (30) In this regard, the Commission notes that, first, albeit the scope of the relevant market could be national, the distribution services of Apple, as well as of its main competitors (for example, Spotify and Deezer) are available across the whole of the EEA. Second, for the purpose of assessing the effects of the Transaction, the market for the distribution of digital music is not relevant in itself, but in light of its relationship, identified in the Notification, with the market for music recognition services, whose scope is EEA-wide.
- (31) **Supply of OSs.** In its previous decisional practice, the Commission took the view that OSs for PCs and for smart mobile devices belong to separate product markets.<sup>10</sup> These markets were defined as EEA-wide, or even world-wide.<sup>11</sup>
- (32) In line with the Commission's past practice, in the Notification, as well as in their reply of 22 December 2017 to a request for information of the Austrian NCA ("the RFI Reply"), the Parties provided PC and mobile OS market share data at worldwide and EEA levels.
- (33) **Online advertising.** In past decisions the Commissions considered the market for online advertising to be separate from offline advertising; it also considered possible further segmentations, but it ultimately left the market definition open.<sup>12</sup> With reference to the geographic scope of the online advertising market and its possible sub-segments, the Commission noted in previous cases that they should be defined as national in scope or alongside linguistic borders within the EEA<sup>13</sup>.
- (34) In the Notification Apple does not take any view as regards the geographic scope of the online advertising market and/or its possible sub-segments.
- (35) 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 alongside 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.

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<sup>10</sup> See Commission decision of 6 December 2016 in Case M.8124 – *Microsoft/LinkedIn*, paragraphs 11-15, Commission decision of 4 December 2013 in Case M.7047 – *Microsoft/Nokia*, paragraph 27.

<sup>11</sup> See Commission decision of 6 December 2016 in Case M.8124 – *Microsoft/LinkedIn*, paragraphs 17-18, and the decisions referred therein regarding mobile OSs, namely Commission decision of 13 February 2012 in Case M.6381 – *Google/Motorola Mobility*, paragraphs 33-35; Commission decision of 4 December 2013 in Case M.7047 – *Microsoft/Nokia*, paragraphs 74-77.

<sup>12</sup> See Commission decision of 21 December 2016 in Case M.8180 – *Verizon/Yahoo*, paragraphs 22-25; 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.

<sup>13</sup> See Commission decision of 21 December 2016 in Case M.8180 – *Verizon/Yahoo*, paragraphs 27-28; 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; Commission decision of 4 September 2012 in Case M.6314 – *Telefónica UK/Vodafone UK/Everything Everywhere/JV*, recitals 226-229; Commission decision of 18 February 2010 in Case M.5727 – *Microsoft/Yahoo! Search Business*, paragraphs 91-93; Commission decision of 11 March 2008 in Case M.4731 – *Google/DoubleClick*, recitals 83-84.

- (36) **Conclusion.** In light of the foregoing, the Commission considers that the requirement that the Transaction affects trade between one or more EU Member States and one or more EFTA States is met.

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

- (37) In a paper submitted to the Commission on 8 January 2018 ("the White Paper"), Apple submits that the Transaction does not raise any competition concern and that therefore the Referral Request does not meet the legal criteria of Article 22(1) of the Merger Regulation and should be rejected.
- (38) In this regard, the Commission notes that paragraph 44 of the Referral Notice provides that a referring Member State should demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse effect on competition and thus deserves close scrutiny. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact and they are without prejudice to the outcome of a full investigation.
- (39) The Austria NCA and the Joining NCAs have identified two types of adverse effects as likely to be brought about by the Transaction: foreclosure conducts leveraging on a strong market position and data accumulation issues.
- (40) **Foreclosure of competing digital music distributors.** The Referral Request explains that the Transaction threatens to significantly affect competition at least within Austria as a result of foreclosure effects. The Austrian NCA argues that, first, the development of the Shazam app for alternative mobile OSs, such as Android, could be discontinued to render the Apple iOS more attractive. Second, the Shazam app could also be used to favour the music streaming service Apple Music over other subscriber-based streaming services like Spotify. According to the Austrian NCA, this would considerably restrict the freedom of choice for Austrian and other European consumers. The Joining NCAs agree with the analysis of the Austrian NCA.
- (41) According to the Non-Horizontal Guidelines,<sup>14</sup> non-horizontal mergers do not give rise to competition concerns unless the merged entity has a significant degree of market power in at least one of the markets concerned.<sup>15</sup> A useful first indication of such market power is provided by market shares and concentration levels.<sup>16</sup> Moreover, pursuant to the Non-Horizontal Guidelines, it is unlikely that competition concerns are found where the market share post-merger of the merged entity in each of the markets concerned is below 30% and the post-merger concentration level (HHI) is below 2000, except where special circumstances

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<sup>14</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Guidelines"), OJ C 265, 18.10.2008, p. 6-25.

<sup>15</sup> See Non-Horizontal Guidelines, paragraph 23

<sup>16</sup> See Non-Horizontal Guidelines, paragraph 24.



arise, such as the imminent expansion of a company because of a recent innovation.<sup>17</sup>

- (42) In the Notification, Apple's market share in the EEA market for mobile OSs is estimated at approximately [20-30]% on the basis of a third party industry report. Shazam's market share in the EEA market for music recognition services was not provided in the Notification, but in the RFI Reply and in the White Paper, and estimated at around [10-20]% based on the number of users of music recognition services reported in different public sources. At this stage, the Commission considers that this data may significantly underestimate the position of Shazam on the market for music recognition services.
- (43) First, in the Notification Apple proposes to leave the market definition for music recognition services open. Accordingly, in the RFI Reply, it submits a market reconstruction which does not distinguish the several possible segments. It is therefore well possible that the relevant market share would be higher if the relevant market were to be defined more narrowly and would for example only encompass music recognition services offered via stand-alone apps.
- (44) Second, in the methodology used by Apple, different metrics have been used to calculate the user number for the various players active in the market. For example, while Shazam's share has been computed on the basis of monthly active users (that is, users who have effectively used the service during one calendar month; [...] as of November 2017), Google's market share is based on an estimate of users who have access to, and could use, the service (even if no use occurred).<sup>18</sup> Likewise, SoundHound's market share is estimated on the basis of the number of "users" (not further qualified) which is similar to the number of total app downloads, as estimated on the official blog of the app (300 million):<sup>19</sup> if the number of total downloads were to be considered to estimate Shazam's market share, it would be more than three times larger than SoundHound's one (over 1 billion).<sup>20</sup> In this respect, the Commission notes that Apple itself submitted that download data cannot be used to measure market shares.<sup>21</sup>
- (45) Third, the market reconstruction submitted with the RFI Reply does not mention the geographic level to which the user data relates, neither does it mention the

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<sup>17</sup> See Non-Horizontal Guidelines, paragraph 25.

<sup>18</sup> Moreover, the RFI Reply estimates the number of users of Google at 1 billion, as number of mobile phones on which Google Assistant would have been rolled out, citing an Internet source (<http://musically.com/2017/10/05/google-takes-shazam-now-playing-smartphone-feature/>) which does not actually refer to the number of Google Assistant users. Moreover, on 5 January 2018 Google has announced that its assistant is available on around 400 million devices, less than half what the RFI Reply estimates. See "How Google Home and the Google Assistant helped you get more done in 2017", available at: <https://blog.google/products/assistant/how-google-home-and-google-assistant-helped-you-get-more-done-in-2017/>

<sup>19</sup> Available at: <https://blog.soundhound.com/soundhound-8-music-discovery-and-playback-redefined-14b4af2632f3>

<sup>20</sup> See "About Shazam": *"The app has been downloaded over 1 billion times, in over 190 countries, and users Shazam over 20 million times each day, helping to shape Shazam's influential weekly charts"*. Available at: <http://news.shazam.com/>

<sup>21</sup> Apple's "observations on the CNMC[the Spanish NCA]'s decision to join the Article 22 referral" of 29 January 2018.

temporal scope of reference for the user data of Shazam's competitors. It is therefore not possible to verify whether, and to what extent, all services considered are available in the EEA.

- (46) Fourth, based on different publicly available rankings, Shazam is consistently the number one free app for the provision of music recognition services on both Android and Apple mobile OSs in all Member States.<sup>22</sup>
- (47) Subject to further investigation, it follows that Shazam's market share in the EEA market for music recognition services (and/or segments thereof) may be in excess of 30%. Therefore, affected markets, or other markets in which the Transaction may have a significant impact, could be identified based on Shazam's activities in the provision of music recognition services and Apple's activities in markets which are either vertically related or neighbouring to music recognition services in the EEA.
- (48) In this context, the Commission considers that *prima facie* there is a real risk of potential foreclosure of digital music distributors competing with Apple, for example (i) through denial or degradation of access to Shazam as an important entry point, in particular, through the "mechanism of referral", and/or (ii) through denial or degradation of access to Shazam's software/technology to power integrated or connected with music recognition services. This is for the following reasons.
- (49) Denial or degradation of access to Shazam as an important entry point. After having "tagged" a song for recognition, Shazam provides the user with song information and various features to enrich the user experience. This includes links to music distribution services to access the song. If the user wants to make use of one of these links, the user will be referred to the platform of the music distribution provider of his choice. These links constitute the mentioned "mechanism of referral".
- (50) In the Notification, Apple estimates that [...] of the referrals go to the digital music distribution services of [...] and Apple and that these referrals account for only [...] of new trials or subscriptions for [...] and Apple. *Prima facie*, the estimate provided by the Parties of the value of the referrals from Shazam for competing digital music distributors appears to be too conservative. Indeed, it disregards the fact that Shazam constitutes an important entry point also for existent users, keeping their interest and relevance of the music distribution service and continuing stimulating the use of such service. For these users, an important reason for using the music recognition app could be to be able to play the recognised music track again on a music distribution service.
- (51) Post-Transaction Apple could deny or degrade the referral mechanism from Shazam to competing music distribution services and this could ultimately have a detrimental effect on other music distribution service providers. This conduct

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<sup>22</sup> See <https://apptopia.com/store-insights/top-charts/google-play/music-audio/austria>; <https://www.applyzer.com/?mmenu=worldcharts>; <https://www.appannie.com/en/apps/ios/top/italy/music/iphone/>. This finding is based on a review of these rankings considering only music recognition services.

could be performed not only for Apple's OSs, but also for other OSs, where Apple Music (Apple's services which would be advantaged by the foreclosure conduct) is available.

- (52) *Denial or degradation of access to Shazam's software/technology to power integrated or connected with music recognition services.* On the basis of the White Paper, the Commission notes that a trend could be identified towards the integration or convergence of the provision of digital music distribution and music recognition services. Indeed, Apple submits that all its major competitors in the provision of digital music distribution services (Google, Spotify, Deezer) have entered also the music recognition services. In this context, and subject to further investigation, access to music recognition services may be becoming an important input for the provision of digital music distribution.
- (53) Pre-Transaction, Shazam appears to be the most successful music recognition service, with a market share likely in excess of 30% (see paragraphs (42) to (47)). It is not vertically integrated in the provision of other services which have music recognition services as an important input, in particular, digital music distribution services. It therefore has the incentives to, and does licence its software/technology to other players, including Apple.
- (54) Post-Transaction Apple could deny or degrade access to Shazam's software/technology to power integrated or connected with music recognition services. This could possibly foreclose existing (non-vertically integrated) players in digital music distribution or make entry in digital music distribution more difficult.
- (55) **Data accumulation.** The Italian NCA, the French NCA and the Spanish NCA pointed to possible competition concerns resulting from a combination of the Parties' databases post-Transaction. The Italian NCA noted that Shazam has a vast database built from 1999 to today, that is certainly an important asset that can be used to enrich the already significant database maintained by Apple in order to identify the consumers' preferences, in particular musical preferences. The integration of Shazam's and Apple's datasets, therefore, could confer a non-replicable advantage to Apple in the markets on which it operates.
- (56) In its paper "Absence of anticompetitive foreclosure effects resulting from the acquisition of Shazam data" of 29 January 2018, Apple submitted that no foreclosure concern can arise from the Transaction as a result of the combination of the Parties' data because Shazam data is not unique and there will continue to be a large amount of valuable user data on the market that is not within Apple's control. To support this claim, Apple provided as examples competing digital music distributors such as Google, Spotify and Deezer, which all would compile more useful user data than Shazam's.
- (57) In this respect, the Commission notes that, to the extent that any data combination is technically and legally possible under the applicable contractual or regulatory framework, the combination under common ownership of two datasets previously held by two independent firms may raise horizontal issues when (a) it increases the merged entity's market power in a market for the provision of products and services for which the combined data are valuable, and/or (b) it increases barriers

to entry and expansion for actual or potential competitors of the merged entity in that market.<sup>23</sup>

- (58) Within this framework, in the present case, taking into account the size of Shazam's and Apple's data measured in terms of users, a combination of the Parties' datasets could potentially have an impact, in terms of increased barriers to entry and expansion, in the market for online advertising, and possible sub-segments (in particular those concerning music services), on which both Parties operate, as well as in the markets for digital music distribution services.<sup>24</sup>
- (59) This preliminary finding is not affected by Apple's submission of 29 January 2018. Indeed, the Commission notes the following.
- (60) First, as mentioned at paragraph (52), according to Apple's White Paper, Google, Spotify and Deezer are all digital music distributors which have recently entered the market for music recognition services. Such trend of integration between digital music distributors and music recognition services may be an indication of the increasing value of music recognition services for digital music distributors, including in terms of data.
- (61) Second, as explained at paragraph (53), pre-Transaction, Shazam appears to be the most successful music recognition service not vertically integrated in the provision of other services which have music recognition services as an important input. Moreover, as explained in the Notification, Shazam currently offers music data and analytics services to third parties. Post-Transaction, there is a risk that Apple could stop offering these services in view of the growing importance of Shazam's data. This could possibly foreclose existing (non-vertically integrated) players in the markets for online advertising, and possible sub-segments (in particular those concerning music services), and/or digital music distribution or make entry in such markets more difficult.
- (62) **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 EFTA Member State making the request is met.

#### 4.3. Appropriateness of the referral

- (63) 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.
- (64) 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

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<sup>23</sup> See Commission decision of 6 December 2016 in Case M.8124 – *Microsoft/LinkedIn*, paragraph 179.

<sup>24</sup> Apple's dataset includes not only data of Apple Music's users (30 million subscribers), but also data of users of other products and services.

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.

- (65) In the present case, the Transaction threatens to significantly affect competition in the market(s) for digital music distribution services and/or online advertising services (and sub-segments thereof).
- (66) First, with respect to the market(s) for digital music distribution services, regardless of the exact scope of the relevant geographic market, the Transaction falls in the categories of cases most relevant for a referral under Article 22 of the Merger Regulation. If an EEA-wide geographic market definition were to be retained in the present case, the Transaction would fall in the first category of cases most appropriate for a referral pursuant to paragraph 45 of the Referral Notice. If, however, the digital music distribution services were to be considered as national in scope, the Transaction would give rise to concerns in the respective national markets of several Member States. Given that the assessment of the effects of the Transaction on the market(s) for the distribution of digital music has to be assessed in light of its relationship with the market for music recognition services, whose scope is EEA-wide, an assessment by the Commission would ensure a coherent treatment as set out in paragraph 45 of the Referral Notice. The Transaction would thus correspond to the second category of cases normally most appropriate for referral under Article 22 of the Merger Regulation.
- (67) Second, 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 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.
- (68) Moreover, the Commission notes that several Member States other than Austria, have joined the Referral Request and have raised issues as to the potential problematic nature of the effects of the Transaction. The [...] and the Swedish NCAs also indicated that they are likely to have jurisdiction over the Transaction, but they have neither gone in-depth in the assessment of the issue, nor have they requested a notification, on the assumption that the Transaction will acquire Union dimension as a result of the Referral Request, that they support. In this context, a consistent review of the Transaction by the Commission is deemed to be appropriate to ensure a consistent assessment of the issues at stake.
- (69) Finally, in the recent years the Commission has acquired considerable expertise in the assessment of transactions in fast-moving digital markets,<sup>25</sup> as well as in some

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<sup>25</sup> See, most recently, Commission decision of 6 December 2016 in Case M.8124 – *Microsoft/LinkedIn*; Commission decision of 3 October 2014 in Case M.7217 – *Facebook/WhatsApp*.

of the markets where the Transaction is likely to raise competition concerns, that is digital music distribution services and online advertising, and with some of the issues likely to arise (for example, foreclosure through denial or degradation of interoperability between software applications, data aggregation).

- (70) Therefore, it is appropriate to refer the Transaction to the Commission pursuant to Article 22 of the Merger Regulation.

## **5. CONCLUSION**

- (71) For the above mentioned 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 the Commission*

*(Signed)*

*Margrethe VESTAGER  
Member of the Commission*