



Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover

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The European Commission has fined Facebook €110 million for providing incorrect or misleading information during the Commission's 2014 investigation under the EU Merger Regulation of Facebook's acquisition of WhatsApp.

Commissioner Margrethe **Vestager**, in charge of competition policy, said: "*Today's decision sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information. And it imposes a proportionate and deterrent fine on Facebook. The Commission must be able to take decisions about mergers' effects on competition in full knowledge of accurate facts.*"

The [EU Merger Regulation](#) obliges companies in a merger investigation to provide correct information that is not misleading as this is essential for the Commission to review mergers and takeovers in a timely and effective manner. This obligation applies, regardless of whether the information has an impact on the ultimate outcome of the merger assessment.

When Facebook notified the acquisition of WhatsApp in 2014, it informed the Commission that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. It stated this both in the notification form and in a reply to a request of information from the Commission. However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities.

[On 20 December 2016](#), the Commission addressed a [Statement of Objections](#) to Facebook detailing its concerns.

The Commission has found that, contrary to Facebook's statements in the 2014 merger review process, the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014, and that Facebook staff were aware of such a possibility.

Today's decision has no impact on the Commission's October 2014 decision [to authorise the transaction](#) under the EU Merger Regulation. Indeed, the clearance decision was based on a number of elements going beyond automated user matching. The Commission at the time also carried out an 'even if' assessment that assumed user matching as a possibility. The Commission therefore considers that, albeit relevant, the incorrect or misleading information provided by Facebook did not have an impact on the outcome of the clearance decision.

Moreover, today's decision is unrelated to either ongoing national antitrust procedures or privacy, data protection or consumer protection issues, which may arise following the August 2016 update of WhatsApp terms of service and privacy policy.

The fine

According to the [Merger Regulation](#), the Commission can impose fines of up to 1% of the aggregated turnover of companies, which intentionally or negligently provide incorrect or misleading information to the Commission.

In setting the amount of a fine, the Commission takes into account the nature, the gravity and duration of the infringement, as well as any mitigating and aggravating circumstances.

Facebook committed two separate infringements by providing incorrect and misleading information in the merger notification form and in the reply to a Commission request for information. The Commission considers that these infringements are serious because they prevented it from having all relevant information for the assessment of the transaction.

Moreover, the Commission considers that Facebook staff were aware of the user matching possibility and that Facebook was aware of the relevance of user matching for the Commission's assessment, and of its obligations under the Merger Regulation. Therefore, Facebook's breach of procedural obligations

was at least negligent. The Commission has also considered the existence of mitigating circumstances, notably the fact that Facebook cooperated with the Commission during the procedural infringement proceedings. In particular, in its reply to the Commission's Statement of Objections, Facebook acknowledged its infringement of the rules and waived its procedural rights to have access to the file and to an oral hearing. This allowed the Commission to conduct the investigation more efficiently. The Commission has taken Facebook's cooperation into account in setting the level of the fine.

On the basis of these factors, the Commission has concluded that an overall fine of €110 million is both proportionate and deterrent.

Background

This is the first time that the Commission has adopted a decision imposing fines on a company for provision of incorrect or misleading information since the entry into force of the [2004 Merger Regulation](#). Past Commission decisions in this regard were adopted under the 1989 Merger Regulation in accordance with different fine-setting rules.

The Facebook/WhatsApp merger case

In August 2014, Facebook, which is active in social networking, consumer communications and online non-search advertising services, notified the Commission of its plans to acquire the consumer communications services provider WhatsApp.

The Commission [cleared](#) the transaction on 3 October 2014, after assessing its impact on the internal market in relation to the following services:

(i) Consumer communications services: the Commission found that Facebook Messenger and WhatsApp were not close competitors and that consumers would continue to have a wide choice of alternative consumer communications apps post-merger. Although consumer communications apps are characterised by network effects, the investigation showed that a number of factors mitigated the network effects in this case.

(ii) Social networking services: the Commission concluded that, no matter what the precise boundaries of the market for social networking services are, and whether or not WhatsApp is considered a social network, the companies are distant competitors.

(iii) Online advertising: the Commission concluded that, regardless of whether Facebook would introduce advertising on WhatsApp and/or start collecting WhatsApp user data for advertising purposes, the transaction raised no competition concerns. This is because, besides Facebook, a number of alternative providers would continue to offer targeted advertising after the transaction, and a large amount of internet user data that are valuable for advertising purposes not within Facebook's exclusive control would continue to exist.

With respect to all three services the Commission carried out its competitive assessment also assuming a scenario where automated user matching would be possible. It concluded that, even in this scenario, its conclusions as to the lack of anti-competitive effects of the proposed transaction would stand.

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