



**PILLAR IV
EUROPEAN UNION AND INTEGRATION**

The case of Facebook and recent developments in EU merger procedural rules¹

By Dr. Nora Memeti, Assistant Professor of Commercial Law, Kuwait International Law School, Doha, Kuwait

I. ABSTRACT

On May 18, 2017 the European Commission addressed the case of Facebook (FB) regarding the infringements of merger procedural rules under EC Merger Rules (ECMR) for providing incorrect or misleading information. Facebook was fined with EUR110 million for breaching EU Merger procedural rules in providing incorrect or misleading information during the acquisition of Whatsapp. This case is discussed in detail in this paper with due regard to the legal background of the European Union Merger Regulation. The paper provides first, a general overview of the EU Merger Regulation and second, the main provisions dealing with EU Merger Procedural rules on misleading information with the recent developments in this field of law in light of the case of Facebook. It is a substantial indication for the merging undertakings to realize that it is mandatory to comply with EU rules while operating within the single market. In addition, such developments have also implications to Candidate countries such as Albania and Macedonia, which have to harmonize their legislation, including their Competition Laws and Policies in accordance with EU legislation. These implications to Albania and Macedonia will also be discussed in light of the recent developments in EU competition law in the case of Facebook.

KEYWORDS: *FB, Whatsapp, ECMR, merger control, procedural violations, misleading information*

ABBREVIATIONS:

ACQUIS	Acquis Communautaire
ANCA	Albanian National Competition Authority
CCS	Consumer Communications Services
EC	European Community
ECMR	EC Merger Regulation
ECSC	European Coal and Steel Community
EU	European Union

¹ For the purpose of this paper the terms ‘merger’ and ‘concentration’ are used interchangeably and refer to EU procedural rules on concentration.



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNAL.AL ♦ Issue 4 November 2017

FB	Facebook Inc.
FTC	Federal Trade Commission
LCPA	Law on Competition Protection, Republic of Albania, No.9121, Dated 28.07.2003
LPCM	Law on the Protection of Competition, Official Gazette 145/10, Republic of Macedonia.
MS(s)	Member State (s)
NCA(s)	National Competition Authority (ies)
OAS	Online Advertising Services
SNS	Social Networking Services
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the EU

II. INTRODUCTION

While the European Commission (EC) was very active in enforcing the procedural rules of Merger Regulation (ECMR), some National Competition Authorities (NCA's) of developed Member States (MSs) weren't passive in this direction either.² Vestager, the European Competition Commissioner, on behalf of the EC, addressed the case of FB as an example of how an undertaking can infringe merger control rules.³ The European watchdog fined FB for providing misleading or incorrect information. Certainly, the rules on misleading or incorrect information are not established only under the EU merger legislation. However, in this paper, they are analyzed from this perspective only.

In this background, the relevant merger rules of the Albanian and Macedonian Competition Laws are also briefly discussed.⁴ In particular, how ECMR rules influence these countries as EU Candidate Members and why the Decision on FB is relevant to them,⁵ taking into consideration that both countries have an obligation to align their legislation with the EU '*Acquis Communautaire*' (*Acquis*)⁶, including their competition policies.

² The current European Commissioner stressed out that the latest fine was unrelated to national antitrust inquiries. The German investigation was about abuse of dominant position by FB by failing to inform the consumers how their personal data is being used. A French data watchdog fined FB €150,000 for failing to prevent users' data being accessed by advertisers. Investigations are also under way in three other Member States such as: Belgium, the Netherlands and Spain. Vestager, the Competition Commissioner underlined that she was closely watching the outcome of investigations by the German authorities and others, while noting that "in our legislation you can be dominant without necessarily breaking any rules – Article 102 TFEU".

³ See the Statement by Commissioner Vestager, Brussels, 17 Mat 2017. Available at: http://europa.eu/rapid/press-release_Statement-17-1367_en.htm.

⁴ Anastasakis, Othon, and Dimitar Bechev. "EU conditionality in South East Europe: bringing commitment to the process." South East European Studies Programme (2003): 1-20.

⁵ Albania and Macedonia together with Montenegro, Serbia and Turkey are considered Candidate Countries that have either started negotiations to join the EU or waiting to start negotiations.

⁶ The '*acquis communautaire*' covers all EU Law, including EU treaties, legislation, court decisions etc.



III. EU MERGER RULES

Mergers are one of the main three pillars within European Competition law. Competition Law consists of rules intended to protect the process of competition and to maximize the consumer's welfare.⁷ EU merger control derived from both Articles 101 and 102 TFEU through the application of then Articles 85⁸ and 86⁹ of the Treaty that the Commission and the Court of Justice first proceeded to control concentrations in the EU. However, when the Merger Regulation was enacted, the legislator considered the "*creation or strengthening a dominant position*", a concept emanating from Article 86, constituted a better foundation for the substantive assessment in merger control.¹⁰ The TFEU provides the legal basis for the adoption of the ECMR in Articles 103 and 353. However, there are no provisions on controlling mergers within the primary legislation.¹¹ Mergers were enacted under EC Merger Regulation in 1989, with the intention to provide a level playing field with the formula of a 'one-stop-shop'.¹² The EC, sometimes jointly and sometimes separately from the NCAs,¹³ enforces directly EU competition rules to ensure that the EU market works better together.¹⁴ This benefits consumers,

⁷ Competition rules were born, with Paris treaty in 1951. Competition law was important segment of the Treaty since the inception and today can be found in the TFEU under articles 101 and 102. The first pillar (101) comprising of the rules on anticompetitive agreements and the second pillar under article 102 comprising the abusive behavior. The third pillar is comprised of mergers, the one analyzed in this paper. See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences, Official Journal C 326 26/10/2012 P. 0001 – 0390. See also Whish, Richard, and David Bailey. Competition law. Oxford University Press, USA, 2015, pages 854-856.

⁸ Judgment of the Court (Sixth Chamber) of 17 November 1987. - British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities. - Competition - Rights of complainants - Shareholding in a competing company. - Joined cases 142 and 156/84.

⁹ Judgment of the Court of 21 February 1973. - Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities. - Case 6-72.

¹⁰ Costa-Cabral, Francisco, and Orla Lynskey. "The internal and external constraints of data protection on competition law in the EU." SSRN Electronic Journal (2015).

¹¹ Craig, Paul, and Gráinne De Búrca. EU law: text, cases, and materials. Oxford University Press, 2015, 1090-2. See also, Foster, Nigel. Foster on EU law. Oxford University Press, USA, 2015, pages, 358-361.

¹² Neither the Treaty of Rome nor the German GWB provided any specific provision for controlling mergers, with the exception of Art. 66(1)-(6) of the European Coal and Steel Community (ECSC) Treaty available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:xy0022&from=EN>, which established an exclusive competence for the High Authority of the ECSC without any residual competence to Member States for establishing national merger control and without the requirement of an effect on trade between Member States, see more: Lianos, I., and A. Andreangeli. "The Competition Law System and the Union's norms." Oxford University Press, 2012.

¹³ Arsenidou, Elisavet, Ailsa Sinclair, and Jurga Stanciute. "Empowering the national competition authorities to be more effective enforcers." Competition Law & Policy Debate 3, no. 3 (2017): 33-39. See also: Kaczorowska-Ireland, Alina. European union law. Routledge, 2016.

¹⁴ Patel, Kiran Klaus, and Heike Schweitzer, eds. The historical foundations of EU competition law: EU Competition law in historical context: Continuity and Change, Oxford University Press, 2013. Pages 207-220.



businesses and the European economy as a whole.¹⁵

In the continent, in addition to the Member States, also the candidate countries have adopted Laws for Protection of Competition, which are in high degree aligned with EU Competition Law as a precondition of membership.¹⁶ In 1989, the so-called 'original Merger Regulation' was adopted.¹⁷ It was revised and replaced by the current version of the Merger Regulation, entering into force on 1 May 2004.¹⁸

Based on the ECMR, concentrations cover mergers, acquisitions of control and the creation of full-function Joint Ventures.¹⁹ As a rule, concentrations with EU dimension are to be investigated by the Commission, while those without EU dimension should be investigated by the NCAs in accordance with their domestic merger control rules.²⁰ Mergers with EU dimension must be, in principle, notified to the Commission²¹ and should not be implemented until the Commission declares them compatible with the single market.²² The Implementing Regulation includes the

¹⁵ Devenney, James, and Mel Kenny, eds. *European consumer protection: theory and practice*. Cambridge University Press, 2012, Christian Twigg-Flessner, Comment: The future of EU Consumer Law – the end of harmonization? Pages, 6-20, See also: Devenney, James, and Mel Kenny, eds. *European consumer protection: theory and practice*. Cambridge University Press, pages 437-449.

¹⁶ Because of the change of the political observances and good will of keeping open market functioning well, today, there are more than 125 competition Law legal systems worldwide. The International Competition Network (ICN) has 126 members from 111 jurisdictions (Vision Statement by Steering Group Chair Andreas Mundt, September 2013). See *Challenges of International Co-operation in Competition Law Enforcement*, OECD Publication, 2014, available at: <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>.

¹⁷ Council Reg. (EEC) 4064/89 (OJ 1989 L395/1, 30.12.1989), as amended by Council Reg. (EC) 1310/97 (OJ 1997 L180/1, 9.7.1997; corrigendum OJ 1998 L40/17, 13.2.1998).

¹⁸ Council Reg. (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004). OJ L 24, 29.1.2004, p. 1 The abbreviation 'ECMR' will be used in the whole text. On the same year the implementing Regulation was also adopted, known as 'Implementing Regulation' (IR) Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 (published in OJ L 133, 30.04.2004, p.1) amended by Commission Regulation (EC) No 1033/2008 of 20 October 2008 (published in OJ L 279, 22.10.2008, p. 3) – Consolidated version of 23 October 2008; 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.

¹⁹ Inkpen, Andrew C., and Steven C. Currall. "The co-evolution of trust, control, and learning in joint ventures." *Organization science* 15, no. 5 (2004): 586-599. See also: Cooper, Cary L., and Sydney Finkelstein, eds. *Advances in mergers and acquisitions*. Emerald Group Publishing, 2014.

²⁰ As an exception to the general rule, there are procedures under which parties can be engaged in pre-notification contacts with the authorities with a purpose of reallocating jurisdiction between the Commission and the NCAs. Procedures also exist for the post-notification reallocation of cases between the Commission and the NCAs, and in certain limited circumstances MSs may still apply their national laws to concentrations with EU dimension.

²¹ European Commission's DG Competition, with competition powers across the European Union that are actively exercised on a regular basis. See also: Finkelstein, Sydney, ed. *Advances in mergers and acquisitions*. Vol. 16. Emerald Group Publishing, 2017.

²² Barnard, Catherine. *The substantive law of the EU: the four freedoms*. Oxford University Press, 2013.



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNAL.AL ♦ Issue 4 November 2017

forms to be completed when notifying concentrations.²³

As mentioned, mergers within the European Union usually occur when two undertakings decide to merge into a new undertaking.²⁴ Horizontal mergers usually generate fear that they might have an adverse effect on the competition.²⁵ A horizontal merger is the one that arises among companies operating at the same level.²⁶ They are considered *unsafe* since after the merger, the relevant market (the product and geographical market)²⁷ will have one firm less than before. This also means one offer less for the consumers and the post-merger company has a larger market share after the merger.²⁸ In our case, Facebook and WhatsApp created a horizontal merger in offering communication applications for smart-phone.²⁹ These two undertakings, when notifying the Commission, gained a positive clearance from it. This means the EC concluded that concentrations between these undertakings would not give rise to concerns. On the other hand this merger comes under the Community dimension regulated under Article 1 ECMR. This Article defines what comes under the 'Community dimension' label determining the thresholds.³⁰ The concept of EU dimension is created in order to catch concentrations, which might create significant change.³¹ The primary assessment is found in Article 1(2) of the ECMR defining the 'Community dimension':

²³ 'The implemented Regulation' Commission Reg. (EC) 802/2004 (OJ 2004 L133/1, 30.4.2004), as amended by Commission Reg. (EC) 1033/2008 (OJ 2008 L279/3).

²⁴ In European Competition Law both terms are used, mergers and concentrations, even though concentrations are to be found in the ECMR. See Martynova, Marina, and Luc Renneboog. "A century of corporate takeovers: what have we learned and where do we stand?(Previous title: The history of M&A activity around the world: A survey of literature)." (2005). Available at www.ssrn.com.

²⁵ There are three types of mergers within the EU Law including horizontal, vertical and conglomerates. Only the horizontal mergers will be subject under scrutiny in this paper. See also the Guidelines on assessment of Horizontal Mergers, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN). See also: Fee, C. Edward, and Shawn Thomas. "Sources of gains in horizontal mergers: evidence from customer, supplier, and rival firms." *Journal of Financial Economics* 74, no. 3 (2004): 423-460.

²⁶ De Geest, Gerrit and Roger J. Van den Bergh. *Comparative law and economics*. Edward Elger Publishing, 2004. Harvard.

²⁷ De Coninck, Raphaël, and Mikaël Hervé. "Mergers: How to Measure Local Competition." *Journal of European Competition Law & Practice* (2017): 1-7. See also Sheridan, Alexandra. "Is the relevant EU legislation regarding competition law on mergers effective in preventing mergers that result in a dominant market position? Or is the Commission exceeding its competence in its application of legislation causing it to be ineffective in light of relevant case law?" (2016). The main question is whether a certain merger will increase the market power of the firms and this is a reason why the first thing to do is defining the market, see: The Commission's Notice on Market definition and Previous Decisional Practice, [1997] OJ C372/5.

²⁸ Hovenkamp, Herbert. *Federal Antitrust Policy, The Law of Competition and Its Practice*. West Academic, 2015.

²⁹ Facebook/WhatsApp Inc, Case COMP/M.7217, European Commission, C(2014)7239 final.

³⁰ See also: Meyer, Jan HF, and Ray Land. "Threshold concepts and troublesome knowledge." *Overcoming barriers to student understanding: Threshold concepts and troublesome knowledge* (2006): 3-18.

³¹ ECMR, recital 8.



A Concentration has a Community dimension where: a) the combined aggregate worldwide turnover³² of all the undertakings concerned is more than EURO 5,000 million, and b) the aggregate community-wide turnover of each of at least two of the undertakings concerned is more than EURO 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community wide turnover within one and the same Member State.

Even though the EC would have preferred lower thresholds than those in article 1(2), the reached compromise was to add article 1(3). This paragraph states that a concentration that does not meet the thresholds laid down in article 1(2) has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Compared to the agreements prohibited under the first pillar of EU Competition law, Mergers create more permanent and lasting change in the market.³³ The ECMR and Article 3(1)(b) define the change of control on a lasting basis. This article outlines a concentration as a circumstance where there is a change of control of an undertaking or part of it on a lasting basis, which results from (i) the merger of two or more previously independent undertakings, (ii) the acquisition, by a person or an undertaking, of control over another undertaking, a part of it or of its assets, and (iii) the creation of a full-function joint venture. Therefore, a concentration may arise either as a result of a merger between previously independent undertakings, or as a result of a change of control³⁴ of an existing undertaking.³⁵

In the case of FB under scrutiny on this paper, only the second category – acquisition of control – is taking place.³⁶ Control is defined by Article 3(2) of the ECMR as the possibility of exercising decisive influence on an undertaking. However, it is not necessary to show that the decisive influence is used. Control shall be constituted by rights, contracts or other means, which confer

³² The definition of ‘turnover is given in paragraph 124 of the Jurisdictional Notice. ’ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01)

³³ Hüschelrath, Kai, and Florian Smuda. "Do cartel breakdowns induce mergers? Evidence from EC cartel cases." *European Competition Journal* 9, no. 2 (2013): 407-429.

³⁴ See also the importance of the ‘control’, Jones, Alison, and Brenda Sufrin. *EU competition law: text, cases, and materials*. Oxford University Press, 2016, page 1085.

³⁵ See Cook, C. John, and Christopher Stephen Kerse. *EC merger control*. Vol. 3. Sweet & Maxwell, 1996.

³⁶ Angwin, Duncan. "Mergers and acquisitions across European borders: National perspectives on pre-acquisition due diligence and the use of professional advisers." *Journal of World Business* 36, no. 1 (2001): 32-57.



the possibility of exercising the decisive influence on an undertaking, in specific by: a) ownership or the right to use all or part of the assets of an undertaking and b) rights or contracts which confer decisive influence on the competition, voting or decisions of the bodies of an undertaking.³⁷ How was FB controlling WhatsApp wasn't even an issue in itself, since the EC cleared the transaction by concluding that they do not impose anticompetitive effect to the market. On the same time, the EC rejected to discuss the 'control' of privacy data, which is at the heart of the consumer protection pillar due to lack of jurisdiction.³⁸

III. INCORRECT OR MISLEADING INFORMATION- THE FACEBOOK CASE

Since the entry into force of the ECMR-in 2004, Facebook³⁹ is considered to be the first decision in which the Commission imposed fines based on article 14(1) for providing incorrect or misleading information. In the past, all the decisions in this context were adopted under the old ECMR with different fine-setting rules.⁴⁰ Article 4 of the new ECMR clearly states that undertakings are obliged to provide correct information during the notification process as well as in the other submissions.⁴¹ Undertakings must provide correct information that is not misleading as this is essential for the EC to review mergers and acquisitions on time and effectively.⁴²

Paragraph 1 of Article 4 specifies in detail the obligation to notify the Commission prior to the implementation and subsequently, following the conclusion of an agreement. Based on the same article, notification should also be made when the undertaking concerned demonstrates to the EC an intention in good faith to conclude an agreement, or another legal relationship...provided that this relationship would result in a concentration with a Community dimension. For the purposes of this Regulation, the term 'notified concentration' shall also cover intended concentrations notified pursuant to the second subparagraph.⁴³

In order to better understand the case of FB, one should have a look at the occurrences of 2014 when FB made a notification to the EC on the acquisition of WhatsApp. FB alleged it could not establish reliable automated matching with the WhatsApp users accounts. This means that amongst other questions they were asked whether it is possible that there will be a link between WhatsApp consumers phone numbers and FB consumer identities in order to share consumer data. FB answered negatively in all the questions related to these issues. During the review, FB

³⁷ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) known as Jurisdictional Notice, paragraph. 16.

³⁸ Tucker, Darren S., and Hill B. Wellford. "Big mistakes regarding big data." (2014).

³⁹ FB/WhatsApp Inc, Case COMP/M 7217, EC C(2014) 7239 final. See also, C.R. Sunstein, *Divided Democracy in the Age of Social Media*, Princeton University Press, 2017.

⁴⁰ Council Reg. (EEC) 4064/89 (OJ 1989 L395/1, 30.12.1989), see also Commission Decision, *Bertelsmann/Kirch/Premiere* (1999/153/EC), May 27, 1998 [1999] O.J. L53/1.

⁴¹ ECMR Art. 4.

⁴² *Ibid.* Art. 4(1), The previous notification deadline of 7-days after reaching a merger agreement was repealed with the 2004 reforms.

⁴³ *Ibid.* Art. 4(2).



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNAL.AL ♦ Issue 4 November 2017

informed the EC that automatically matching data between them and WhatsApp user accounts was not possible or desirable. FB via FB Messenger and WhatsApp both offer applications for smart-phones called "apps".⁴⁴

This was the reason why the EC unconditionally cleared FB's acquisition (gave green light) with WhatsApp following a Phase I review in that period of time. In other words, in 2014, the EC had authorized, the proposed acquisition of WhatsApp Inc. by FB, Inc., both companies originating in the United States (the same was done by the US authorities) and operating in both, the US and the European market.⁴⁵

The EC found that Facebook Messenger and WhatsApp are not close competitors and that consumers would continue to have a varied choice of alternatives.⁴⁶ The EC's investigation focused on three areas related to the product market: consumer communications services (CCS), social networking services (SNS), and online advertising services (OAS). Regarding the CCS, the EC found that FB Messenger and WhatsApp were not close competitors and that consumers would continue to have a widespread choice. While network effects exist in the market for consumer communication apps, here, they are unlikely to shield the merged entity from competition from existing or new competing apps.⁴⁷ Second, regarding the SNS, the EC 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. Based on the number of (monthly) users, FB is considered the largest social network connecting 2 billion users worldwide and WhatsApp the fifth.

They are not considered potential competitors in the market for SNS as they perform different functions.⁴⁸ And finally, considering the OAS, the EC concluded that, regardless of the fact whether FB would introduce advertising on WhatsApp and/or start collecting WhatsApp user data for advertising purposes, the transaction once more, raised no competition concerns.⁴⁹

The reason is that besides FB, a number of alternative providers would continue to offer targeted advertising after the transaction, and a large amount of Internet user data that is valuable for

⁴⁴ 'Apps' allow consumers to communicate by sending text, pictures/photos, voice and video messages.

⁴⁵ Ellerbrok, Ariane. "Empowerment: analyzing technologies of multiple variable visibility." *Surveillance & Society* 8, no. 2 (2010): 200-220. See also Perez-Vega, Rodrigo, Kathryn Waite, and Kevin O'Gorman. "Social impact theory: An examination of how immediacy operates as an influence upon social media interaction in Facebook fan pages." *The Marketing Review* 16, no. 3 (2016): 299-321.

⁴⁶ Press release on Mergers: Commission approves acquisition of WhatsApp by Facebook, available at http://europa.eu/rapid/press-release_IP-14-1088_en.htm, Brussels, 3 October 2014.

⁴⁷ FB/WhatsApp Inc, Case COMP/M 7217, EC C(2014) 7239 final, paras. 127-134.

⁴⁸ Ibid. para. 158.

⁴⁹ Giovanni Pitruzzella, Big Data and Antitrust Enforcement, *Revista Italian di Antitrust*, N.1 2017, see also Along with Google, FB is one of the largest and best channels for online marketing, at <https://blog.lexicata.com/get-more-law-firm-reviews> online/?utm_campaign=shareaholic&utm_medium=linkedin&utm_source=socialnetwor.



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNAL.AL ♦ Issue 4 November 2017

advertising purposes not within FB's exclusive control would continue to exist. WhatsApp does not, for the time being, collect user data that is valuable for advertising purposes.⁵⁰ With respect to all of these services, the EC 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 be valid.⁵¹ Regarding the privacy issues deriving from the increased concentration of data, the decision underlines that these issues are not within the scope of EU competition law rules.⁵²

It should be emphasized that in the case of FB, the rivals of the concentration raised concern to the EC as to possible use of data among them, which is considered a very hot topic these days within the EU.⁵³ Some authors consider that data in itself are neither good nor bad, but their use and control may weaken the competition altogether with the consumer protection.⁵⁴ The main issue is that the consumer protection is closely related to use and control of privacy based on the data owned by undertakings like Facebook and WhatsApp analyzed in this paper.⁵⁵ However, the protection of personal data is considered to be under substantive merger assessment and not procedural which is the case here.⁵⁶

Awkwardly, the EC in this case underestimated the real value of the data, although FB purchased WhatsApp for US \$19 billion at a time when they reported millions in net losses, which gives assumptions that the real time data was included in the price. In July 2016, the EC received a document from a third party that the merged undertakings have a correspondence regarding user accounts. At this time, WhatsApp announced changes of its terms and condition of service and privacy policy, including the possibility of linking WhatsApp consumers phone numbers with FB consumer identities.⁵⁷ The EC issued a 'Statement of Objections' to FB detailing its concerns on the potential violation of the ECMR.⁵⁸ The investigation found that the technical possibility of

⁵⁰ FB/WhatsApp Inc, Case COMP/M 7217, EC C(2014) 7239 final (paras.165-7).

⁵¹ Yaghoubi, Reza, Stuart Locke, and Jenny L. Gibb. "Sources of Value in Mergers and Acquisitions." (2013), page 7.

⁵² FB/WhatsApp Inc, Case COMP/M 7217, EC C(2014) 7239 final, (para. 164).

⁵³ Boutin, Xavier, and Georg Clemens. "Defining 'Big Data' in Antitrust." (2017).

⁵⁴ Ezrahi, Ariel. EU competition law: an analytical guide to the leading cases. Bloomsbury Publishing, 2016, page 454. See also Trattner, Marina. "Assessment of anti-innovative mergers in high technology markets. What kind of substantive test should be done to protect innovation?." (2016).

⁵⁵ FB/WhatsApp Inc, Case COMP/M 7217, EC C(2014) 7239 final, (para. 164).

⁵⁶ Sokol, D. Daniel, and Roisin E. Comerford. "Does antitrust have a role to play in regulating big data?." (2016).

⁵⁷ Botros, M, Privacy Rights in the Age of Social Media: Facebook Passwords and Legal Implications, Law school Student Scholarship, eRepository, 2013, see also Natasha Lomas, WhatsApp to share user data with Facebook for ad targeting here's how to opt out, August 25, 2016, <https://techcrunch.com/2016/08/25/whatsapp-to-share-user-data-with-facebook-for-ad-targeting-heres-how-to-opt-out/>, see Lindsay S. Feuer, 'Who is Poking Around Your FB Profile? The need to reform the stored Communications Act to React a Lack pf Privacy on Social Networking Websites' Hofstra Law Review, Vol 40. Issue 2 Fortieth Anniversary Volume, 2011.

⁵⁸ The European Commission has sent a Statement of Objections to Facebook alleging the company provided incorrect or misleading information during the Commission's 2014 investigation under the EU Merger Regulation of



automatically matching FB and WhatsApp user's identities existed since 2014. Twice they had provided them with false information, in the notification form and in the respond to a request. The EC established that FB already had breached the obligation to provide complete and accurate information, and that this breach might be considered as negligent.

The Commission at that time also carried out an *'even if'* assessment that assumed user matching as a possibility. It is important to mention that even the Director of FTC and Bureau of Consumer Protection, USA, noted in the letter to the merging parties that they should continue to honour the privacy of the consumers.⁵⁹

The latest decision on FB has no impact on the Commission's decision of October 2014 to authorize the transaction under the ECMR. However, the decision is important for the following reasons: this is the first decision to fine a company under the new ECMR for providing incorrect and incomplete information.⁶⁰ Second, there is a suggestion to review this case also for potential privacy infringements, however, the decisions explicitly underlines that such a review is outside of the scope of competition law. And third, the EC, based on the FB's cooperation during the investigation, reduced the fine in half. It remains unclear whether this would be an established practice for future cases or more of a deterrent for other companies in the market.

Finally and very briefly it should be mentioned that one of the main duties of the Commissioner is to safeguard the application of EU Law and the general interest of the Union.⁶¹ However, being politically coloured, this is not always easy.⁶² Based on Vestager's interview concerning Commission Decision on Facebook,⁶³ it seems that the EC has taken a more firm position to crack down on any breaches of the EUMR of the big 'Sharks'. It is in the Commissioners power

Facebook's planned acquisition of WhatsApp.Brussels, 20 December 2016, http://europa.eu/rapid/press-release_IP-16-4473_en.htm.

⁵⁹The Federal Trade Commission Protecting America's Consumers, FTC Notifies FB, WhatsApp of Privacy Obligations in Light of Proposed Acquisition, Available at: <https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed>.

⁶⁰ Soon other decisions followed. In July 2017 the EC sent a statement of objection to 'General Electric' Merck and Canon for providing inaccurate information during their merger operations. The Commission has sent three separate Statements of Objections to Merck and Sigma-Aldrich, General Electric and Canon alleging they breached EU merger rules: General Electric, and Merck and Sigma-Aldrich by providing incorrect or misleading information; Canon by implementing a merger before notification and clearance.http://europa.eu/rapid/press-release_IP-17-1924_en.htm, Brussels, 6 July 2017.

⁶¹ Article 17 of the Treaty on European Union (TEU), Articles 234, 244 to 250, 290 and 291 of the Treaty on the Functioning of the European Union (TFEU), and the Treaty Establishing a Single market.

⁶² This Commission is more focused on the ECMR proper application in comparison to the previous Commission. See: Drauz, Gotz, Thomas Chellingsworth and Hertta Hyrkas. "Recent Developments in EC Merger Control. "Journal of European Competition Law & Practice 1, no. 1 (2009): 26.

⁶³ European Commission, Press release, Mergers: Commission alleges Altice breached EU rules by early implementation of PT Portugal acquisition, Brussels, 18 May 2017, available under: http://europa.eu/rapid/press-release_IP-17-1368_en.htm



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNAL.AL ♦ Issue 4 November 2017

to try to calm the boiling water while the merged concentrations breach the merger rules, but they should at the same time, be very much aware not to burn their hands.⁶⁴

V. FINES

Under article 14(1) of the ECMR, the Commission can impose a maximum fine of up to 1% of the worldwide turnover for intentional or negligent conduct of providing incorrect or misleading information⁶⁵In determining the fine to FB, the EC emphasized the serious nature of the breaches. It was stated that not having all the relevant information for the assessment of the transaction, the Commission was not able to conduct a proper investigation. The wrongfulness comes from FB with holding facts it knew or should have known, awareness is a duty, especially concerning the relevance of matching data.

However, due to their cooperation in the investigation and accepting the breach of the ECMR, the EC decided to lower the fine.⁶⁶FB 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 EC considers that these infringements are serious because they prevented it from having all relevant information for the assessment of the transaction. The registered turnover in 2016 was €28 billion, but the EC took into account the mitigating circumstances to reduce the fine: €55 million for having provided false information in the notification form and €55 million for providing the same false information in the response to a request.

Therefore, FB's breach of procedural obligations was considered at least negligent. The EC concluded that an overall fine of €110 million is both proportionate and deterrent. The fine would not reverse the Commission's decision to clear the purchase of WhatsApp and was unrelated to separate investigations into data protection issues as well.

⁶⁴ Eleanor M. Fox, Walter J. Derenberg Professor of Trade Regulation at New York University School of Law, International Economic Law Trade, Developing Countries, Markets and Competition Laws: How Developing Countries Are Trying to Improve Their Economic Wellbeing by Harnessing Markets to Work for Them. Her speech is available at UN Audiovisual Library of International Law, http://legal.un.org/avl/ls/Fox_E_IEL.html#.

⁶⁵ Para.1 of art 14 states that: 'EC by decision impose on the persons referred to in Art.3(1)b, undertakings or associations of undertakings, fines not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently: (a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3)'.

⁶⁶ Vestager indicated that the Commission is very busy investigating a number of similar breaches and other fines will come as well. These developments follow a previous investigation into the potential provision of misleading information by Munksjo and Ahlstrom. This case was triggered by inconsistencies between market shares estimates given in the form CO. See Case M.6576-Munskjo/Ahlstrom.



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNAL.AL ♦ Issue 4 November 2017

VI. THE FACEBOOK CASE AND COMPETITION LAW IN ALBANIA AND MACEDONIA

Both, the ‘Law on Competition Protection in Albania’⁶⁷ (LCPA) and the ‘Law for Protection of Competition in Macedonia’⁶⁸ (LPCM), prescribe the rules on merger control in accordance with the ECMR, as a precondition of their candidacy status as potential EU Member States.⁶⁹ Since the rules on incorrect or misleading information are also provided in the laws of both countries (Albania and Macedonia), the practice of the Commission in the Facebook case provides for a relevant case law to be adopted as a basis for interpretation of the relevant provisions in these Candidate countries. This also in the light of the fact that EU Competition Law has direct effect as part of the *EU Acquis Communautaire (Acquis)*, and should be adopted and implemented by both countries during their path toward EU integration. If the specific provisions of the Competition Laws in Albania and Macedonia are reviewed, it is noticeable that such legal basis is provided in their relevant legislation.

Both legislations prescribe the rules on incorrect or misleading information during the notification of a certain concentration as reflected in FB. Namely, the LCP in Albania differentiates between ‘not serious’ and ‘serious’ infringements’. Article 73 (1)(a) under the Violations and Sanction, Part Four of the LCPA establishes fines on ‘not serious infringements’. This paragraph specifies that if the undertakings supply incorrect or misleading information in response to a request made or a decision taken,⁷⁰ pursuant to articles 12 and 33 of this Law, or additional incorrect and incomplete information and documents pursuant to article 55 of this Law will be sanctioned. In such cases, the Albanian National Competition Authority (ANCA) prescribes fines not exceeding 1% of the total turnover in the preceding business year.

Article 12 (3)(b) defines the acquisition as undertakings, which acquire control, and those who are subject of the control, defining at the same time what control means. This is almost all in line with ECMR. Undertakings participating in a concentration are obliged to provide the requested information to the competent authority.⁷¹ Where these undertakings supply incomplete information the Commission competent for competition issues may demand the information concerned by a decision.⁷² Based on Para. 4 of the same article, the companies shall not refuse in

⁶⁷ Republic of Albania Assembly Law NO. 9121, date 28.07. 2003, “On Competition Protection”, (LCPA).

⁶⁸ Law on the Protection of Competition, Official Gazette 145/10, Republic of Macedonia. (LPCM).

⁶⁹ Commission Staff Working Document Albania 2016 Report, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_albania.pdf.

⁶⁹ Commission Staff Working Document, The former Yugoslav Republic of Macedonia 2016 Report: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf.

⁷⁰ See LCPA Article 33, paragraph 1-2.

⁷¹ Ibid. Article 33 (1).

⁷² Ibid. Article 33(2).



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNAL.AL ♦ Issue 4 November 2017

any case to provide the commission with the information even if they are of commercial secret nature.⁷³ Undertakings concerned in a concentration are also under duty to provide to the authority additional information and documents as so far as they are interested in assessing the concentration.⁷⁴ On the other hand, in Macedonia, the Law⁷⁵ determines the scale of the fine if undertakings in concentration submit false or misleading data to the Commission for Protection of Competition.

It provides that the Commission for Misdemeanor Matters shall impose a fine in the amount of up to 1% of the value of their total annual turnover, if in the notification and the appendices to the notification and in the supplement, the data submitted is false or misleading. From the main articles of the LPC in Macedonia, it is easy to conclude that the law, in particular the section created pursuant to the ECMR, undoubtedly and explicitly states the rules on incorrect or misleading information. Both Laws prescribe the fines for such a breach not exceeding or up to 1% of the total turnover, which in the future might also be a topic of discussion, taking into consideration the size and effectiveness of the markets.

VII. CONCLUSIONS AND RECOMMENDATIONS

The action of the European Commission analyzed in this paper, is a strong indicator to all stakeholders that the EU merger procedural rules should be respected in the EU Member States.⁷⁶ The Commission's fine to FB may present a lesson not only to them but to all companies breaching merger procedural rules and to not neglect the fact that the use and control of data can undermine Competition Law and give rise to other concerns such a privacy and consumer protection.⁷⁷

In addition, this may have implications also to Candidate countries, currently Non-EU Member States, such as Albania and Macedonia in their process of harmonizing the *Acquis* in competition law. In order for them to comply with the approximation of *Acquis*, their rules on merger control need to be revised and developed to incorporate the latest developments and the decisions of the EC. Especially, since Facebook operates also in these Candidate Countries and other EU potential⁷⁸ Candidates, it may serve as a basis for the harmonization of the *Acquis* in this area as well.

⁷³ Ibid. Article 33(4).

⁷⁴ Ibid. Article 55(1).

⁷⁵ LPCM, Article 61.

⁷⁶ Jia Lynn Yang, *Dangerous Waters? FB's Link to Online Games Has Some Charging the Social Network has waded into Antitrust Territory*, Daily Herald CH, June 30. 2011.

⁷⁷ Ezrachi, Ariel. *EU competition law: an analytical guide to the leading cases*. Bloomsbury Publishing, 2016, page 452. See also Costa-Cabral, Francisco, and Orla Lynskey. "The internal and external constraints of data protection on competition law in the EU." *SSRN Electronic Journal* (2015). See also, Stucke, Maurice E., and Allen P. Grunes. "Debunking the myths over big data and antitrust." (2015).

⁷⁸ Bosnia and Herzegovina and Kosovo are considered potential candidates and they are promised the prospect to join the EU when ready.