

THE LATEST: EU Commission Fines Facebook EUR 110 million for Providing Incorrect or Misleading Information

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The Commission's EUR 110 million fine on Facebook for breach of its procedural obligations under the EU merger control rules underscores the need to submit full, accurate and reliable information during the Commission's merger control review process. An intentional or negligent failure to do so will lead to draconian fines—even where the provision of incorrect or misleading information does not have an impact on the ultimate outcome of the Commission's decision.

WHAT HAPPENED:

- In October 2014, the Commission gave Phase I merger control clearance to the acquisition of WhatsApp by Facebook (Transaction). In December 2016, that Commission announced that it had sent Facebook a Statement of Objections alleging that Facebook had intentionally, or negligently, submitted incorrect or misleading information to the Commission during its review of the Transaction by stating that it was unable to establish reliable automated matching between its users' accounts and WhatsApp users' accounts.
- On 18 May 2017, the Commission concluded that, contrary to Facebook's submissions during the Commission's merger control review of the Transaction, 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.
- While the incorrect or misleading information submitted by Facebook did not have a bearing on the outcome of the approval decision, the Commission found that Facebook's conduct was a serious breach of its procedural obligations under the EU merger control rules. Taking into account Facebook's cooperation with the Commission's investigation into the matter, by *inter alia* waiving its right to have an oral hearing, the Commission ultimately imposed a fine of EUR 110 million on Facebook.

WHAT THIS MEANS:

The Commission's decision to impose a fine on Facebook for breach of its procedural obligations, while a first under the 2004 Merger Regulation, follows in the wake of previous decisions finding that companies had illegally provided incorrect or misleading information during the Commission's review

process:

- In 1999, a German postal operator was fined EUR 100.000 for supplying incorrect and misleading information in a notification and inaccurate information in response to a request for information (RFI).
- In 1999, two European pharmaceutical companies were fined EUR 50.000 each for the supply of information which was manifestly incorrect as regards the identification of the affected markets.
- In 2002, an Asian multinational was fined EUR 50.000 for failing to supply information, as an intervening third party. The Commission also ultimately imposed a periodic penalty payment totaling EUR 900.000 in this context.
- In 2002, a European energy company was fined EUR 35.000 for omitting to disclose important co-operation arrangements and to identify affected markets, and because it had provided misleading information on the competitive situation on other markets.
- In 2004, a European packaging company was fined in EUR 90.000 for providing incorrect or misleading information when responding to an RFI.

The Commission has recently stated that it is currently looking into whether additional companies may have supplied incorrect or misleading information during recent merger control proceedings. In this context, the fine on Facebook reiterates that the Commission is keeping a very close eye on whether companies are complying with the procedural rules, and serves as a stern reminder for merging parties (and indeed intervening third parties) of the need to provide accurate and reliable information to the Commission. Failure to supply full information can not only lead to a rejection of a merger notification, but to fines of up to 1 percent of the aggregate turnover of the company concerned—on top of the attendant reputational damage that such outcome can cause.

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