

CPI EU News Presents:

Commission Approval For Microsoft's \$7.5 Billion Github Acquisition CASE M.8994 – *MICROSOFT / GITHUB*

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On October 19, 2018, following its phase I investigation, the European Commission (“Commission”) approved the proposed acquisition of GitHub Inc. (“GitHub”) by Microsoft Corporation (“Microsoft”). This short analysis aims to provide further insight into the Commission’s decision. I will first provide a summary of the relevant facts, followed by a brief overview of the Commission’s reasoning. Afterwards, I will provide some further thoughts on this case.

Essential Facts

On June 4, 2018, Redmond, Washington-based Microsoft announced its intention to acquire sole control over San Francisco-based GitHub for USD 7.5 billion in Microsoft stock (the “Transaction”).² Pursuant to an agreement and plan of merger signed on the same date, GitHub would become a wholly-owned subsidiary of Microsoft. On September 14, 2018, the proposed concentration was notified to the Commission.

Microsoft is active in the design, development and supply of computer software (including various software development and operations (“DevOps”) tools), hardware devices and related services, cloud-based solutions, online advertising, recruiting, and professional social network services. GitHub is active in the supply of DevOps tools and in particular a popular source code hosting platform for version control and collaboration on software development, for use online (“GitHub.com”), and on-premises (“GitHub Enterprise”), and job listing services.

In its decision, the Commission held that the parties’ activities overlap in DevOps. They both offer a source code hosting platform for version control and collaboration, as well as code editors and integrated development environments (“IDE”). In addition, the Commission found that there are several non-horizontal links between the parties’ activities, in particular between, on the one hand, source code hosting platforms for version control and collaboration and, on the other hand, other DevOps tools and cloud services.

Outcome

The Commission approved the proposed acquisition of GitHub by Microsoft. The Commission concluded, in essence, that effective competition in the relevant markets would continue to exist and Microsoft would have no incentive to undermine the open nature of GitHub’s platform.

First, the Commission conducted a thorough investigation into the presence of non-coordinated horizontal effects in the source code hosting and IDE markets. The Commission found that the combination of Microsoft and GitHub’s activities on these

markets would raise no competition concerns because the merged entity would continue to face significant competition from other players on both markets:

- The Commission established that, as indicated by economic research, Microsoft products cannot be considered alternatives for GitHub products with regard to the market for source code hosting services for version control and collaboration. Further, GitHub and Microsoft could not be considered close competitors, as they focus on different customer categories. The Commission also established that there would continue to be sufficient competition after the concentration, with consumers having plentiful choice and opportunity to switch hosting platforms.
- With regard to the non-coordinated horizontal effects on the use of code editors and IDEs, the Commission found that there were no effects that had the potential to severely impede the internal market. Although the combined market share of the parties would average 20 to 30 percent after the Transaction, there would be sufficient competition, as a wide variety of options would remain in the field of code editors and IDEs.

The Commission also assessed whether there would be a risk of non-horizontal non-coordinated effects on source code hosting services for version control and collaboration, if Microsoft were to leverage the popularity of GitHub's software development platform to boost its own sales of DevOps tools and cloud services. In particular, the Commission looked at whether Microsoft would have the ability and incentive to further integrate its own DevOps tools and cloud services with GitHub while limiting integration with third parties' DevOps tools and cloud services. The market investigation confirmed that Microsoft would not have the market power to undermine the open nature of GitHub to the detriment of competing DevOps tools and cloud services. This is because such behavior would reduce the value of GitHub for developers, who are willing and able to switch to other platforms.

Author's Opinion

It follows from the Commission's decision that the Transaction does not cause any issues from a purely *competition law* perspective. However, as was observed in *Forbes*, if the turnover of the target is viewed in relation to the value of the takeover, the Transaction poses a number of questions from a *business perspective*:

“Even in a world in which billion dollar tech acquisitions have become run-of-mill, this deal raises eyebrows. Microsoft's \$7.5 billion offer is approximately 30 times GitHub's annual recurring revenue---an incredible multiple. After all, Microsoft's 2016 acquisition of LinkedIn for \$26 billion was a mere 7.2 times LinkedIn's annual recurring revenue.”³

According to the article, the high price of the Transaction could be an indication that Microsoft is aiming to deny its competitors access to the platform, or even integrate the technology from the platform with its own software. Furthermore, Microsoft will have full access to the data that GitHub collects through its platform. This could be disadvantageous to competitors that use the GitHub platform, which may discourage them from using the platform in the future. In view thereof, the question is whether the Commission needs to step up and prevent large tech firms from acting anti-competitively more effectively.

The Commission rejected this view in its decision, arguing that Microsoft has neither the intention nor the capacity to take such steps. The decision also indicates that, if such consequences were to occur, competitors would have the possibility to switch to an alternative platform.

Now that the Transaction has been approved, Microsoft's actual intentions and their potential effects on competition law will become clear.

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² Microsoft, *Microsoft to acquire GitHub for \$7.5 billion*, June 4, 2018 at <https://news.microsoft.com/2018/06/04/microsoft-to-acquire-github-for-7-5-billion> (last visited 7-17-2018).

³ Forbes, "Microsoft and GitHub: Jaw-Dropping Price Tag Brings Competitive Concerns," August 29, 2018, at <https://www.forbes.com/sites/washingtonbytes/2018/08/29/microsoft-and-github-jaw-dropping-price-tag-brings-competitive-concerns/#430e3a295312> (last visited 7-17-2018 ???).