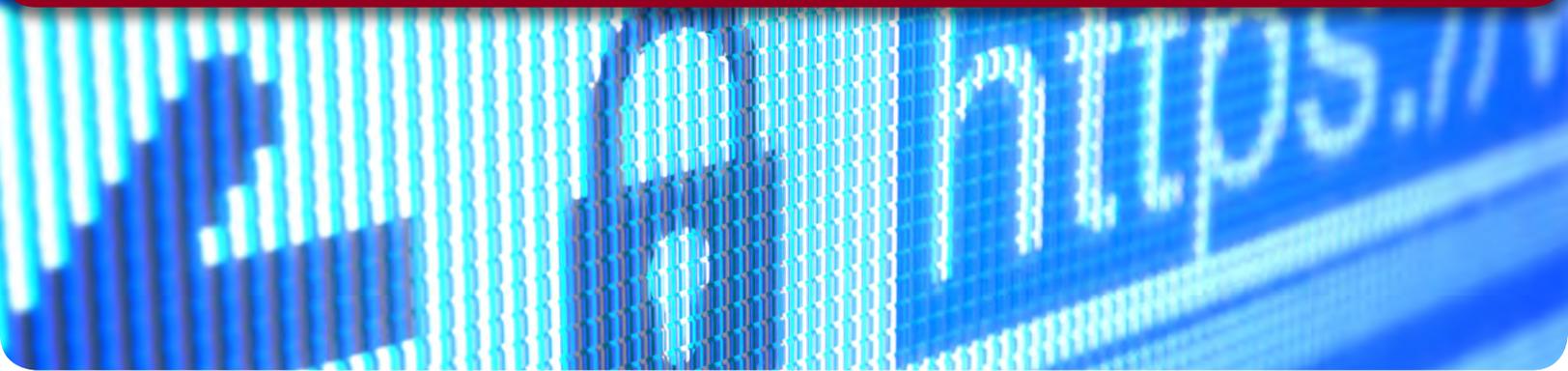


COMPETITION IN DISSIMILARITY: LESSONS IN PRIVACY FROM THE FACEBOOK / WHATSAPP MERGER



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I. INTRODUCTION

In recent years, privacy has attracted considerable attention in competition law discussions, particularly where companies in data-rich industries seek a merger or acquisition. Prime examples in this regard include mergers involving Google/DoubleClick, Facebook/WhatsApp and the recent acquisition of LinkedIn by Microsoft.² These data-mergers raise novel competition law questions including whether digital platforms compete on privacy and how such competition can be factored into merger assessments. In a thought provoking dissenting opinion to the Federal Trade Commission's ("FTC") decision in *Google/DoubleClick* and a subsequent co-authored law journal article, then Commissioner Pamela Harbour insisted on defining "privacy related markets" when companies that control massive personal data seek to merge.³ Noting that the conventional analysis overlooks the privacy interests in data-mergers, Harbour argued, defining "a privacy-based relevant product market" provides the hook to make privacy "cognizable" under competition law.⁴ This allows competition authorities to consider whether a merger or achieving a dominant position changes the incentives to compete on privacy and privacy policies.⁵

To a certain extent, the above argument seems to have gained some traction in later decisions of the European Commission ("EC"). Although the Commission did not define a separate market for "privacy," both in the *Facebook/WhatsApp* and *Microsoft/LinkedIn* mergers, the Commission recognized privacy as a form of non-price competition parameter.⁶ In the most recent decision involving *Microsoft/LinkedIn*, the EC stated that privacy "can be taken into account in the competition

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² See *Google/DoubleClick* (Case No COMP/M.4731) Commission Decision C(2008) 927 [2008]. *Facebook/WhatsApp* (Case No COMP/M.7217) Commission Decision C(2014) 7239 [2014]. See also European Commission - Press release, Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions (Brussels, December 6, 2016) (hereinafter *Microsoft/LinkedIn*).

³ 'Dissenting Statment of Commissioner Pamela Jones Harbour in the Matter of Google/DoubleClick F.T.C. File No. 071-070', (2007) at 10. See also Pamela Harbour and Tara Koslov, 'Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets', *Antitrust Law Journal*, (2010).

⁴ Dissenting Statment of Commissioner Pamela Jones Harbour (n 3), p. 10.

⁵ See also Harbour & Koslov (n 3), p. 794.

⁶ *Facebook/WhatsApp*, para 174.

assessment to the extent that consumers see it as *a significant factor of quality*” and concluded that “data privacy was an important parameter of competition between professional social networks on the market, which could have been negatively affected by the transaction.”⁷ Similarly, in the *Facebook/WhatsApp* merger, the Commission stated that in markets for consumer communications,⁸ privacy and data security constitute key parameters of competition.⁹

This note comments on the Commission’s decision in the *Facebook/WhatsApp* merger regarding the competition in privacy and privacy policies between the two firms. Although the decision dates back to 2014, there has been reinvigorated interest in the last few months following WhatsApp’s change of privacy policy, despite public promises to the contrary, to share data with Facebook and also collect data from other members of the Facebook family of companies.¹⁰ The decision is particularly interesting because it was the first of its kind to recognize privacy as a non-price competition parameter with regards to digital services. In that decision, although the Commission identifies privacy as a key parameter of competition in the market for consumer communications,¹¹ its consideration of privacy comes only in relation to its analysis of the advertising market. Investigating the impact of the merger on the advertising market, the Commission assessed how privacy considerations constrain the merged entity from introducing targeted advertisement in WhatsApp.¹²

The Commission, however, failed to assess the impact of the merger on the incentives of the parties to compete on privacy and privacy policies (conditions for collecting, storing and processing data) in the market for consumer communications. What is striking is that the Commission used the differences in privacy policies as a factor that makes the messaging services of the two companies complementary rather than competitors.¹³ In concluding that Facebook Messenger and WhatsApp are complementary services, not competitors, the Commission mentioned the differences relating, among others, to “the privacy policy (contrary to WhatsApp, Facebook Messenger enables Facebook to collect data regarding its users that it uses for the purposes of its advertising activities).”¹⁴ The Commission further added that the “only factors on the basis of which WhatsApp and Facebook Messenger were considered close competitors by certain respondents are the *communications functionalities* offered and *the size of their respective networks*.”¹⁵ One question that comes to mind is: if privacy is a competition parameter, isn’t dissimilarity in privacy policy one way where such competition could be manifested?

The Commission’s approach in the merger is based on the understanding that firms with identical privacy policies compete more fiercely than firms with dissimilar privacy policies.¹⁶ However, this approach has flaws. To begin with, if privacy and data security are competition parameters, one way this competition can be manifested is through deploying privacy enhancing technology (e.g. instant deletion of photos, end-to-end encryption) and privacy policies (offering better conditions of data collection and processing). If so, competition in privacy and privacy policy is more sequential than simultaneous, meaning

7 *Microsoft/LinkedIn* (n 2).

8 In that decision, the Commission analyzed three markets, namely, consumer communications services, social networking services and online advertising services. See *Facebook/WhatsApp*, para 34, 62 and 79.

9 *Ibid.* para 87.

10 See WhatsApp Blog, ‘Looking ahead for WhatsApp’ (WhatsApp, August 25, 2016). See also WhatsApp Privacy Policy, available at <https://www.whatsapp.com/legal>. On December 20, 2016, the Commission issued statement of objection to Facebook for providing allegedly misleading or incorrect information about the merger. See European Commission - Press release Mergers: Commission alleges Facebook provided misleading information about WhatsApp takeover (Brussels, December 20, 2016). However, the Commission provided a caveat that the investigation doesn’t concern privacy, data protection or consumer protection issues. The Italian Competition Authority has also opened an investigation against WhatsApp. December, See Reuters, ‘Italy antitrust agency probes WhatsApp messaging service’ (October 28, 2016). The Hamburg Commissioner for Data Protection and Freedom of Information has issued an administrative order to prevent this transfer of data. See Press Release, ‘Administrative order against the mass synchronisation of data between Facebook and WhatsApp’ (September 27, 2016) available at ([link](#)).

11 *Facebook/WhatsApp*, para 87.

12 *Ibid.* para 174.

13 *Ibid.* para 105.

14 *Ibid.* para 102.

15 *Ibid.* para 103, and 172. See also footnotes. Even with regard to the communications functionalities, the Commission indicated that “WhatsApp is not the closest competitor to Facebook Messenger (let alone to Facebook’s social networking site).”

16 See Darren Tucker, ‘The Proper Role of Privacy in Merger Review’, *CPI Antitrust Chronicle*, 2 (2015), p. 6 (arguing that a merger leads to anticompetitive privacy effects if large share of customers regard the merging firms as offering the best products due to their privacy).

that it can occur through dissimilarity where the adoption of a certain technology, policy or a change thereof by an entity, if found attractive by consumers for offering better privacy, drives others to follow suit. There is some research showing such sequential change in privacy policy among competitors.¹⁷ Thus, when it comes to privacy and privacy policies, dissimilarity either in the technology or policy can be just the beginning of a competition that exerts competitive pressure on others, rather than make the firms complementary. In the context of the merger, this implies that the Commission might have underestimated the competitive constraints that WhatsApp, by opting for a different privacy policy and luring users from Facebook, imposes on Facebook to compete on privacy technology and privacy policies.

Furthermore, when a service attempts to draw users from an established network by offering superior privacy, the existence of an established network such as Facebook, *albeit* with a different privacy policy, can still discipline the former's behavior. Given that WhatsApp was trying to induce users of Facebook's social network to use its messaging service by offering better privacy,¹⁸ its competitive concern, if it were to change its privacy policy, would not only be that it would lose its users to messaging services with similar privacy policies, which might not happen because of the size of the networks, but also that it might lose its competitive edge over Facebook. Thus, despite the dissimilarity, Facebook, as an established network, imposes competitive constraints on WhatsApp's behavior on privacy policy, which might have been overlooked by the Commission. Although, in the absence of empirical evidence, it is difficult to attribute WhatsApp's change in privacy policy directly to the merger, the subsequent change in policy does provide a useful insight in understanding how two messaging services with different privacy approaches could constrain each other's behavior. However, none of these arguments should imply that the Commission would have reached at a different conclusion had it factored in the above arguments, rather the aim is to highlight some lessons that can be taken on board for future similar decisions.

The remainder of the note is structured as follows. First, I highlight how competition in privacy and privacy policy might occur through dissimilarity and how WhatsApp, through its dissimilarity imposes competitive pressure on Facebook to compete on privacy technology and privacy policies. Secondly, I discuss how Facebook, as an established network, constrains WhatsApp's behavior on privacy and privacy policies. Finally, I examine whether the Commission's assessment of privacy as a constraint to competition in the advertising market is adequate to subsume the privacy interests of users in the market for consumer communications and draw some lessons going forward.

II. WHATSAPP'S COMPETITIVE CONSTRAINT ON FACEBOOK

In the merger, the Commission recognized that consumer communication services such as WhatsApp and Facebook Messenger compete for consumers primarily on non-price parameters, including "privacy and security, the importance of which varies from user to user but which are becoming increasingly valued, as shown by the introduction of consumer communications apps specifically addressing privacy and security issues."¹⁹ Despite this, the Commission used the differences in privacy policies as a factor that makes the messaging services of the two companies complementary rather than competitors.²⁰ The Commission's stance could be partially related to the understanding that firms with identical privacy policies compete more fiercely than firms with dissimilar privacy policies. For example, Tucker argues that privacy considerations are "cognizable" in mergers only where "the merging firms are significant rivals due to their competition on privacy; and a large share of customers regard the merging parties as offering the best products as a result of their approaches to privacy."²¹ This implies that when entities exhibit significant differences in their value to privacy and how they handle personal data of individuals, they are not considered to be competitors. This seems to be the approach adopted by the EC in the *Facebook/WhatsApp* merger. However, this is only partially true when it comes to competition in privacy.²²

17 See Harbour & Koslov, (n 3) p. 793-794.

18 See Stucke & Grunes, *Big Data and Competition Policy* (Oxford University Press, 2016), p. 132.

19 *Facebook/WhatsApp*, para 87.

20 *Ibid.* para 105.

21 Tucker (n 16), p. 5.

22 I do not dispute the claim that a merger of firms that draw customers due to their superior privacy can lead to reduced competition, particularly if the market for such

To begin with, from an economic stand point, privacy remains a competitive dimension regardless of whether the specific entity provides little or more of it.²³ Whether the entities concerned collect massive amounts of consumer data or little data, they all try to assure consumers that they, consumers, are in control of their data and that the data is secure, which shows that competition, *albeit* to different degrees, exists among entities that collect consumer information. There is some research showing that companies react to each other's behavior on privacy policy.²⁴ In 2008, Google, Yahoo and Microsoft responded to each other's changes on privacy policy in shortening the retention period for the data they collect.²⁵ Similarly, Google's decision to anonymize search data after a certain period is believed to spur a similar move by Microsoft and Yahoo!.²⁶ In this sense, privacy policies are subject to constant change and the dissimilarity in privacy policy can be just the beginning of a competition that exerts competitive pressure on others to follow suit, rather than make the firms complementary.

Competition on privacy could also occur in the form of developing or deploying underlying technologies used to protect privacy such as encryption i.e. competition in innovation.²⁷ As noted by the Commission, unlike Facebook, WhatsApp provides an end-to-end encryption of messages and does not store consumers' information on its servers. This privacy protective feature together with the growing popularity of WhatsApp could be seen to impose a competitive pressure on Facebook to follow suit. Commenting on a similar subject, former FTC Commissioner Harbour and her legal advisor, Koslov argued as follows:

Absent pressure from competitors [*such as WhatsApp*] who might provide more attractive alternatives to privacy-prioritizing consumers, a dominant firm [*such as Facebook*] might rationally choose to innovate less vigorously around privacy or, perhaps, to dole out privacy-protective technologies to the marketplace more slowly.²⁸

In this sense, WhatsApp imposes competitive constraints on Facebook to try to compete on privacy enhancing technologies, and thus is not merely complementary to Facebook. In fact, in a move that imitated WhatsApp, Facebook recently introduced an end-to-end encryption, *albeit* with a limited functionality, to its Messenger service. The main objective for such a change, according to Facebook's vice president of messaging products, is "to make Messenger your primary messaging platform. . ."²⁹ Although this fact could be taken to argue that the merger did not reduce Facebook's incentive to compete on privacy enhancing technologies, it demonstrates that, even after the merger, Facebook still competes with WhatsApp to become the primary messaging platform by offering similar data security levels offered by other platforms such as WhatsApp. Additionally, it is questionable that Facebook would compete as vigorously if WhatsApp had remained a separate entity. Facebook being in charge of matters now; it can effectively neutralize WhatsApp's vigor and innovation in privacy enhancing technology and offering better data privacy conditions.³⁰ The change in WhatsApp's privacy policy to share data with Facebook family companies is perhaps a testimony to such reduced vigor to compete on privacy and privacy policies. More importantly, Facebook's introduction of end-to-end encryption shows that competition in privacy enhancing technology can be manifested sequentially.

The Commission should have investigated the impact of the merger on the incentives of the parties to compete

services is already concentrated. But in today's market reality dominated by business models that heavily rely on collecting and analysis massive amount of personal data, a merger between two privacy friendly services could be positive for privacy because the merged firm could benefit from network effects and be able to impose better competitive constraints on the established firms.

23 Stucke & Grunes, (n 18), p. 131.

24 Harbour & Koslov, (n 3) p. 793-794.

25 Ibid. p. 793.

26 Ibid. p. 794.

27 Ibid.

28 Ibid. p. 795 [addition mine].

29 'Facebook Messenger adds end-to-end encryption in a bid to become your primary messaging app' (*TechCrunch*, July 8, 2016).

30 Costa-Cabral and Lynskey, 'Family ties: the intersection between data protection and competition in EU Law', *Common Market Law Review*, 54 (2017), p. 38.

on privacy technology and privacy policy.³¹ One lesson from this is that competition in privacy and privacy policy is more sequential than simultaneous, meaning that it can occur through dissimilarity where the adoption of a certain technology, policy or a change thereof by an entity, if found attractive by consumers for offering better privacy, drives others to follow suit.

III. FACEBOOK'S COMPETITIVE CONSTRAINT ON WHATSAPP

Another source of critique to the Commission's stance in *Facebook/WhatsApp* relates to the competitive constraints that Facebook, as an established network, imposes on WhatsApp privacy policy. If privacy is an important parameter of competition for a company, which was the case with WhatsApp, the existence of an established network such as Facebook with a different privacy policy can still discipline the former's behavior on privacy. This is particularly the case if the firm that offers increased privacy is using that feature to displace or lure users of the incumbent network. In such cases, the existence of the incumbent network (however different its privacy policy might be) can serve as a competitive constraint because any change that reduces the privacy features could lead to losing the competitive edge over the incumbent.

As the Commission itself pointed out, 80-90 percent of WhatsApp users were users of Facebook's social network and "were therefore already within the reach of Facebook Messenger."³² The Commission further noted that because of its integration with the core aspects of Facebook's social network, the user experience in Facebook Messenger is far richer than WhatsApp.³³ Moreover, at the time of the merger, WhatsApp users in many countries were paying a subscription fee of USD \$1 while they can use Facebook Messenger for free.³⁴ This means that all other things being equal; one would expect Facebook Messenger to be more attractive for users than WhatsApp. However, as was indicated by the Commission, WhatsApp had more users (approximately 600 million users worldwide) than Facebook Messenger (approximately 250-350 million users).³⁵ Then the question is why WhatsApp was more attractive to Facebook's social network users than Facebook Messenger?

Needless to say that the restrictive data collection practice is one of WhatsApp's key competitive advantages over Facebook Messenger. As indicated by the Commission, contrary to Facebook, WhatsApp only stores limited information about its users (namely, user name, picture, status message, phone number and the phone numbers in the user's phone book) and does not offer targeted advertisement. By contrast, Facebook collects information about users including but not limited to their real names, gender, birthdate, birth place, religion, political affiliations, "likes" and social media contacts. Facebook also tracks users browsing behavior through millions of websites that have Facebook plugins such as "like" and "share." Furthermore, using the data, Facebook offers targeted advertisement and shares the information with third parties. All in all, WhatsApp presented itself as a clear alternative to Facebook on how it handles user privacy and data by offering users an ad-free experience and superior privacy protection at nominal yearly subscription fee.³⁶ Arguably, this is the key feature that led to WhatsApp acquiring 600 million users even in a shorter time than Facebook itself managed.³⁷

In this sense, it is fair to say that the existence of Facebook as the more established and leading communication service provider has, to some extent, imposed competitive constraints on WhatsApp's privacy policy, which is its key disruptive

31 Ibid. p. 37-38.

32 *Facebook/WhatsApp*, para 105 and 70-80.

33 Ibid. para 104.

34 At the time, WhatsApp charged an annual subscription fee in Italy, the UK, Canada and the U.S. and up until first half of 2014 in Germany and Spain. See *ibid.* para 90-91.

35 Ibid. para 84.

36 The ideology behind the services also sits in clear contrast. Following the announcement of the acquisition, WhatsApp cofounder Jan Koum stated that "Respect for your privacy is coded into our DNA, and we built WhatsApp around the goal of knowing as little about you as possible". See WhatsApp Blog, 'Setting the Record Straight' (March 17, 2014) available at ([link](#)). Conversely, Facebook founder, Mark Zuckerberg remarked that "privacy is no longer a social norm." According to him, "people have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people." See Johnson, 'Privacy no longer a social norm, says Facebook founder' (*The Guardian*, January 11, 2010).

37 See Zarsky, 'The privacy-innovation conundrum', *Lewis & Clark Law Review*, 19/1 (2015), p. 167 (noting that the privacy sentiment is WhatsApp's main draw to its popularity).

element to gain popularity. This is because in order to remain competitive with Facebook (to keep Facebook's social network users using WhatsApp's messaging service), WhatsApp had to offer something that Facebook did not. Because if WhatsApp had to start collecting personal data, its unique feature that attracted users of Facebook's social network would disappear and its customers might spend less time using its services and more time on other services, including Facebook Messenger.³⁸ In other words, as a late follower, WhatsApp had to offer something to lure Facebook users and it used privacy as a draw to Facebook users. As noted by Stucke and Grunes "Facebook sought users who spend more time on its texting app Messenger than WhatsApp. WhatsApp, to induce Facebook social network users to switch from messenger, offered greater privacy protections."³⁹

By so doing, WhatsApp has managed to attract the majority of its users (80-90 percent) from Facebook. Thus, WhatsApp's competitive concern, if it were to change its privacy policy and data handling practices, would not only be that it would lose its users to messaging service with similar privacy policies, which might not happen because of the size of the networks, but also that it might lose its competitive edge over Facebook. To the extent this is valid, one possible explanation for WhatsApp's post-merger behavior to degrade privacy – by changing its privacy policy to share data with Facebook and also collect data from other Facebook family of companies – could well be due to the merger lifting the competitive constraint that Facebook placed on WhatsApp. This is because the merged entity can recapture some of the consumer loss due to the privacy degradation to WhatsApp through an increase in usage of Facebook Messenger.⁴⁰ Thus, the Commission should have investigated the potential degradation in WhatsApp's privacy conditions post-merger and whether privacy sensitive users have adequate substitutes if this happens.⁴¹

IV. CONSIDERING PRIVACY HALF-HEARTEDLY: LESSONS GOING FORWARD

The retort to the above arguments can be that the Commission did in fact, *albeit* from the advertising side, assess the potential degradation in WhatsApp's privacy conditions and even identified messaging services that WhatsApp users could substitute in case of degradation. As briefly noted above, in investigating whether WhatsApp could introduce targeted advertisement, the Commission concluded that data privacy concerns would constrain WhatsApp from introducing targeted advertisement because WhatsApp has to change its privacy policy and start collecting more data from users.⁴² According to the Commission, the introduction of advertisements in WhatsApp could lead to its users switching to ad free services such as Viber.⁴³ Moreover, the Commission indicated that the introduction of ads might lead to abandoning the end-to-end encryption in WhatsApp, which might create dissatisfaction among users that value their privacy.⁴⁴ In this regard, the Commission referred to a submission showing that, following the announcement of the acquisition by Facebook, many German WhatsApp users have downloaded alternative messaging services such as Threema and Telegram.⁴⁵ Threema advertises itself as a service designed "to protect the users' privacy – an app that stores as little as possible and prevents surveillance and data misuse."⁴⁶ Similarly, as indicated by the Commission, Telegram offers increased privacy protection such as end-to-end encryption, and there is no behavioral advertisements.⁴⁷

38 See Waehrer, 'Online services and the analysis of competitive merger effects in privacy protections and other quality dimensions', (Available at SSRN, 2015), p. 13 (arguing that if services compete in quality, such as privacy, "the implication is that for any service an increase in its own quality level (all else equal) increases user demand for the service").

39 Stucke & Grunes (n 18), p. 132.

40 Waehrer (n 38), p. 14 (noting that services competing in quality can, post-merger, reduce the quality if "a decrease in quality by service 1 results in the merged firm recapturing some of the customers lost to service 1 through an increase in usage of service 2").

41 See Costa-Cabral & Lynskey (n 30), p. 37-38.

42 *Facebook/WhatsApp*, para 174.

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

46 Threema Press Release, 'Threema: The Best Selling Secure Messenger' (*Threema Press-Info*, Dec. 22, 2015) available at [\(link\)](#).

47 *Facebook/WhatsApp*, para 116 and footnote 79.

To a certain extent, this shows that the Commission did investigate the potential degradation in privacy conditions in WhatsApp and the alternative messaging services for users in case that happens. Then, the question is whether this analysis is adequate to subsume the privacy interests of users on the consumer communications market. The answer is, probably not. To begin with, it is questionable that the Commission intended to analyze the potential impact of the merger on the privacy and privacy policy. Even if it intended to do so, the assessment was incomplete.

On the one hand, the Commission focused on messaging services that have similar privacy policies but with little or no regard to their sizes. The fact Threema and Telegram offer similar privacy protections does not necessarily mean that they can adequately constrain WhatsApp's post-merger behavior on privacy policy. When people make decisions about joining a messaging app, their primary criteria is whether they can reach their family, friends and acquaintances rather than just privacy policy.⁴⁸ Thus, the size of the networks is crucial. This means whether Telegram or Threema can constrain WhatsApp's behavior on privacy policy depends not only by their privacy policy but also their size. The Commission identified that size as a key utility in communications services. According to the Commission, "the size of the user base and the number of a user's friends/relatives on the same consumer communications app is of important or critical value to customers of consumer communications apps."⁴⁹ In this regard, the Commission noted that WhatsApp and Facebook were, at the time, the number one and number two messaging service providers with a respective user base of 600 million and close to 250-350 worldwide.⁵⁰ By contrast, at the time of the merger, Threema had only 400,000 users and was mainly available in Germany whereas, according to TechCrunch, Telegram had around 50 million monthly active users.⁵¹ If the Commission had intended to assess the substitutability of these services in case WhatsApp changes its privacy policies, it should have factored in the size of the networks.

Even assuming that these services are substitutes regardless of their size, the Commission's assessment remains limited. This is because the switch by some German WhatsApp users to these services alone does not provide sufficient indication that these services offer alternatives for privacy sensitive consumers. In assessing substitutability of two products where money changes hands, the test is not only whether an increase in price leads consumers switching to substitutes but also whether such switch in consumers makes the price increase unprofitable.⁵² Although the absence of monetary price in the case makes it difficult to replicate this test, the lack of a comparable criterion could lead to an overly broad market. The assessment gets even more complicated because even if the change in privacy policy to introduce targeted ads leads to consumers deserting WhatsApp, it does not necessarily entail loss of revenue or is unprofitable. This is because the revenue generated from the advertisement might be superior to the loss of consumer resulting from the change of privacy policy. In this sense, the Commission only looked at the change of privacy policy as something that is inherently 'unprofitable' to WhatsApp without counter balancing the possible gains from the advertising sides – thus made the basic error of accounting for only one-side in two-sided markets. To some extent, this emanates from the lack of a minimum threshold relevant for understanding when the loss of consumers from a service provided at "zero" price becomes unprofitable and constrains the firm's behavior.

The approach adopted by the Chinese Supreme Court in *Qhioo v. Tencent* could shed some light on this issue. In that case, the Court analyzed whether non-integrated Instant Messaging ("IM"), similar to WhatsApp, can be considered to be substitutable Integrated IM service. The Court established what is referred to as the "majority and important rule."⁵³ This concept underlines that in defining the relevant market through demand substitution, the analysis need to be made whether there are "adequate users who would regard a specific good as an alternative...based on the core demand of *majority*

48 Stucke & Grunes (n 18), p. 132.

49 *Facebook/WhatsApp*, para 129.

50 *Ibid.* para 128.

51 See Butcher, 'Telegram Claims 50M Monthly Active Users, Seems To Be Attracting Teams' (*TechCrunch*, Dec. 8, 2014).

52 The price increase is unprofitable if the marginal profit from the price increase does not make up the loss sustained due to customers deserting to substitutes.

53 Wei, 'Relevant Market Definition and Market Dominance Identification in 3Q War', *Competition Pol'y Int'l*, 11 (2015), p. 66.

users and from the perspective of the key attributes of goods.”⁵⁴ More specifically, the Court underlined that in assessing the substitutability of products offered at “zero” price, one has to ask whether a “majority” of users regard a certain product as a close substitute to the target product.⁵⁵ In these cases, the Court relied on statistical data to rule on the substitutability of Integrated and Non-Integrated IM services.⁵⁶ In the *Facebook/WhatsApp* merger, the Commission should have asked a similar question, i.e. whether, given their sizes and their privacy policies, an adequate number of users consider Telegram and Threema as close substitutes with WhatsApp.

Absent some threshold to assess unprofitability, the competitive constraints imposed by such networks could easily be overestimated. Although it is difficult, without empirical evidence, to attribute WhatsApp’s change in privacy policy directly to the merger, there are two likely scenarios that can logically explain WhatsApp’s post-merger behavior to change its privacy policy and share consumer data with Facebook. One possible explanation for such change could be that the merged entity would not lose enough customers to messaging apps with superior privacy such as Threema and Telegram due to their sizes. Alternatively, the loss of customers to WhatsApp, as noted above, is compensated by increase in usage of Facebook messaging. Or a combination of both.

The main point is that although services with similar privacy policies impose competitive constraints, given the size of its user base, Facebook imposes equally important, if not more important competitive constraints on WhatsApp privacy policies. Similarly, by opting for a different privacy policy and luring users from Facebook, WhatsApp imposes constraints on Facebook to compete on privacy technology and privacy policies. Thus, in future mergers, the Commission should focus on the competitive constraints that entities impose on each other through providing more attractive alternatives to privacy-prioritizing consumers, and through the size of the networks. Alternatively, as proposed by Evans, when services are provided for free, the proposed relevant markets would need to also include complementary products.⁵⁷

54 Ibid.

55 Ibid.

56 Ibid. p. 67.

57 ‘Antitrust Economics of Free’, *Competition Policy International*, Spring, (2011), p. 21.

