

Competition Law and Litigation

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Facebook/WhatsApp Case: The Fine that was (not) imposed by the European Commission

Much has been discussed recently about digital platform markets and the relevance the data (personal or not) can have on the performance of the services and the products offered by these platforms. In particular, the debate on the use of such data has intensified further in the last years as a result of the advent of laws on privacy and personal data protection: in Europe, the General Data Protection Regulation – GDPR, and in Brazil, the General Data Protection Law - LGPD (Law no. 13.709/2018).

Nonetheless, issues involving data may have multiple approaches that, though seemingly overlapping in some cases, are distinct and protect different legal assets. One of the decisions that had the greatest impact on data use was the condemnation of Facebook, in regards to the sharing of data from WhatsApp users, by the European Commission, the European bloc's competition defense body. However, some confusion has been made about the European Commission's decision and its true significance within the great debate about the use of this data.

As an illustration of some of the debates, though not mentioning many others which are equally relevant, the use of data can be analyzed from a variety of perspectives, such as the following: (i) the extent to which 'data' can be considered a sufficiently relevant asset in reducing the competitive environment and becoming an 'essential facility' and/or a competitive 'bottleneck'; (ii) the data processing capacity and its use to boost artificial intelligence, becoming a competitive differentiator; (iii) the need for adequacy in the processing of personal data for LGPD purposes; or (iv) violations of consumer protection law, Civil Rights Framework for Internet use or other specific regulations that possible leaks and misuses may cause. All of these are pertinent and valid discussions and should be addressed in their respective realms - notwithstanding the possibility of inevitable interactions between them.

In reference to the case of the fine imposed on Facebook by the European authority, the discussion did not focus on any of these points. To shed light on this point, it is important to analyze critically the European Commission's decision, since the approval of Facebook's acquisition of WhatsApp in 2014.

A Brief Analysis of the Decision

On August 29, 2014, Facebook notified the European Commission of the purchase of the WhatsApp instant messaging service for a total of \$19 billion.

On October 3, 2014, the Commission approved the transaction without restrictions, after concluding that in the instant messaging market (in which there would be horizontal concentration): (i) Facebook Messenger and WhatsApp would not be close competitors due to differences in their use, operation, and form of presentation; (ii) there would be competitors offering all of the same services offered by the parties and there would be viable substitutes; (iii) there would be no relevant switching costs between services; (iv) there would be no significant barriers to entry; and (iv) even so, the barriers to entry represented by the digital platform's structure would not be strong enough to protect rival applicants and new entrants.

During the investigation of the case, one of the main concerns raised by third parties to the authority¹ was that the acquisition would allow the integration of Facebook and WhatsApp user bases, thereby strengthening existing networking effects.² However, the applicants reported that automatic integration would not be possible, as there would be no technical means to match Facebook users to WhatsApp users and that extensive engineering efforts would be required to match the communication systems of the two platforms.

Nevertheless, on June 30, 2016, Facebook communicated to the Commission a change in WhatsApp's privacy policy that would allow automatic integration of the application's user bases with Facebook's bases, which caught the authority's attention. At which point, the authority requested that the company clarify the compatibility of that change with the statements made at the time of the original notification. This triggered an investigation against Facebook to determine if misleading information was provided to the Commission at the time of the notification process for the acquisition of WhatsApp.

¹ The Commission did not disclose details identifying which third parties raised these concerns, although it can be assumed that they were Facebook and/or WhatsApp competitors.

² The so-called "network effects" or "network externalities", designate the increase in value for a user of a particular good or service from another user of that same good or service. For example, a user will find more value in registering in a particular social network that is better known than if it is not. In so-called "multi-sided markets" (services that interconnect different groups of consumers, e.g. sellers and buyers - in the case of marketplace platforms, such as Mercado Livre or shopping malls - and users and advertisers - in the case of online services such as search engines or social networks). These network effects can be "direct" (when there is an increase in value by increasing the number of users on the same side of the platform, as in the above example of users of the same social network) or "indirect" (when there is an increase in value for one side of the platform from a greater number of users on the other side - in the case of ad services; the value of the platform to advertisers will be greater the greater the number of users on the other side who can be exposed to that ad). See e.g. EVANS, David S. SCHMALENSEE, Richard. The Antitrust Analysis of Multi-Sided Platform Businesses. NBER Working Paper No. 18783, 2013; ROCHET, Jean-Charles. TIROLE, Jean "Platform Competition In Two-Sided Markets". Journal of the European Economic Association (Wiley) 1, no. 4. 2003, pp. 990-1029.

In its Statement of Objections issued on December 20, 2016, the Commission stated³ that it had reached a preliminary conclusion that Facebook had intentionally, or at least negligently, provided incorrect or misleading information, regarding the possibility of combining the Facebook ID database with the WhatsApp phone number database, both in the notification and in response to an information request sent by the authority during the course of the merger review.

In its response to the Statement of Objection, Facebook basically acknowledged all of the facts alleged by the European Commission, and in the context of cooperation with the authority, assumed that its conduct could be qualified as 'negligent' or 'at the very least minimally negligent.' Furthermore, the Commission decided in May 2017 to fine Facebook a total of 110 million euros for violating Article 14(a) and (b)(1) of Regulation (EU) No. 139/2004, after finding that the possibility of correspondence between the users of the applications already existed at the time of the notification and that Facebook and its employees were effectively aware of this fact.

It is important to note that the penalty applied was for providing false or misleading information throughout the process of notifying and approving Facebook's acquisition of WhatsApp. The provision of incorrect information would have occurred on at least two occasions: 1) on the transaction notification form, and 2) in response to requests for information from the Commission. Therefore, the integration of Facebook's and WhatsApp's databases was not considered for implementation at that time, yet, there was at least theoretical knowledge of the existence of this possibility, which was not correctly reported to the Commission.

In the decision that imposed this fine, no consideration was given to the possible need of reviewing the operation, nor the effects of providing this incorrect information. In fact, in the original decision approving the acquisition, the Commission had already analyzed the effects of possible integration of the databases of the two applications and scored that there would be a large overlap between the users of both, which would make user gains attainable after the acquisition, yet not relevant enough to strengthen the network effects. Thus, the authority had previously concluded that there would be no concerns arising from this integration. For that reason, the 2017 decision did not even review or revise the Commission's previous findings on the effects of integrating Facebook's and WhatsApp's databases. Whether Facebook was fined or if the operation truly influenced is another story. This analysis had already been carried out previously, and the operation was approved in a scene where integration could potentially occur.

³ "On 20 December 2016, the Commission issued a statement of objections ("the Statement of Objections") pursuant to Article 18 of the Merger Regulation addressed to Facebook. In the Statement of Objections, the Commission stated that it had come to the preliminary view, with respect to the possibility of matching FB IDs automatically with WA users' mobile phone numbers, that: (i) Facebook, Inc. had intentionally or at least negligently supplied incorrect or misleading information in the final Form CO in the context of Case No. M.7217 – Facebook/WhatsApp; (ii) Facebook, Inc. had intentionally or at least negligently supplied incorrect or misleading information in the Reply of 23 September 2014 provided in response to the RFI of 18 September 2014 made pursuant to Article 11(2) of the Merger Regulation in the context of Case No. M.7217 – Facebook/WhatsApp; (iii) fines should be imposed on Facebook, Inc. in accordance with Article 14(1)(a) and Article 14(1)(b) of the Merger Regulation." (Decision of the European Commission of 17 May 2017).

Conclusions

As the eyes of the antitrust world increasingly turn to the supposed economic power of digital platforms, sometimes the fine applied in the Facebook/WhatsApp case is referred to as an indication of the attempts to curb that power. However, this needs to be analyzed simply for what it actually was: "a clear sign to companies that they must comply with all aspects of European merger control legislation, including the obligation to provide truthful information," as Competition Commissioner Margrethe Vestager stated at the time.⁴ Even nearly 3 years after the decision, much confusion is still being voiced about the European Commission's analysis of this case.

The debate on digital platforms, the General Data Protection Act, the antitrust law, consumer protection, and other related topics should progress and be deepened. Nevertheless, the analysis of this particular decision and the fine imposed on Facebook has very little to say regarding this issue. The possibility of database integration was reviewed by the Commission throughout the merger (concluding that it would not raise competition concerns), and the provision of false information to the authority by Facebook has led to penalties, as in many other cases.

The acquisition was notified as case M.7217, and the fine procedure was named M.8228.

⁴ European Commission, press release "Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover". Brussels, May 2017. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369>. Access on December 17, 2019. Free translation of "a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information"