Privacy as a Parameter of Competition in Merger Reviews

Mark MacCarthy[*]

TABLE OF CONTENTS

I. INTRODUCTION 2
II. GENERAL REMARKS 6
  A. *Traditional Antitrust Merger Review Preserves, But Does Not Enhance, Competition.* *6*
  B. *Advancing Privacy Protections is Not a Legitimate Objective of Traditional Antitrust Merger Reviews* *8*
  C. *Relationship of Privacy Law to Merger Review* *10*
  D. *Privacy Can Be Legitimately Treated as an Aspect of Competition in Merger Reviews* *13*
  E. *Some Conceptual Points* *15*
  F. *Empirical Requirements* *20*
  G. *Privacy Competition Can Be Reduced After a Merger in Several Different Ways* *22*
  H. *Consumer Harms Connected to Privacy Are Cognizable in Merger Analysis Only If They Result from a Lessening of Competition* *25*
III. FACEBOOK/WHATSAPP 28
IV. MICROSOFT/LINKEDIN 34
V. LESSONS LEARNED 38
VI. CONCLUSION 41

[*] Adjunct Professor, Communication, Culture, and Technology Program, Georgetown University; Senior Fellow, Institute for Technology Law and Policy at Georgetown Law. Thanks to Mark Whitener, John Mayo, Peter Swire, the participants at presentations of previous versions of this paper at the September 2019 TPRC Conference and at the November 2019 Brussels Privacy Conference, including Orly Lynskey, Joris von Hoboken, and Nicolo Zingales. They are not responsible for the views expressed in the paper or for any remaining errors. Thanks also to the Federal Communications Law Journal staff for their assistance with this publication.

I. INTRODUCTION

Over a decade ago, legal scholars and advocates started a discussion on the intersection of privacy and competition law and policy. This discussion arose from the merger of Google and DoubleClick, and the possibility that the privacy practices of the merged entity could be cognizable under the antitrust merger review at the FTC. Advocates such as the Electronic Privacy Information Center (EPIC)[1] and FTC Commissioner Pamela Harbour[2] argued that privacy as such was a relevant aspect of competition falling within the scope of merger review. The FTC majority at the time, however, thought otherwise, and approved the merger after finding that advertising competitors would have access to the data they needed to compete.[3]

At the time, privacy scholar Peter Swire offered the now-standard explanation of how competition law could accommodate privacy concerns. Without taking a position on the merits of the Google-DoubleClick merger, he argued that: "[P]rivacy harms can lead to a reduction in the *quality of a good or service*, which is a standard category of harm that results from market power. Where these sorts of harms exist, it is a normal part of antitrust analysis to assess such harms and seek to minimize them."[4]

What is the realistic potential for merger reviews to address privacy concerns, especially among digital platforms where privacy concerns are most pronounced? In order to answer this question, this Article focuses on how merger reviews under current competition law treat privacy as a dimension of competition.[5] After making some general remarks on the topic, this Article

---

1. *See* Complaint and Request for Injunction for the Electronic Privacy Information Center, Google, Inc., F.T.C. File No. 071-0170 (Apr. 20, 2007) https://epic.org/privacy/ftc/google/epic_complaint.pdf [https://perma.cc/U9EB-BQRR].

2. *See* Pamela Jones Harbour, Dissenting Statement, Google, Inc., F.T.C. File No. 071-0170 (Dec. 20, 2007) https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf [https://perma.cc/6E8A-GBTY].

3. "[T]he evidence indicates that neither the data available to Google, nor the data available to DoubleClick, constitutes an essential input to a successful online advertising product. A number of Google's competitors have at their disposal valuable stores of data not available to Google." Statement of FTC, Google, Inc., F.T.C. File No. 071-017, 12 (Dec. 20, 2007) [hereinafter FTC Statement, Google/Doubleclick], https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf [https://perma.cc/8BCF-7G6G]. The European Commission reached a similar conclusion that "the combination of [Google's] data about searches with [DoubleClick's] data about users' web surfing behaviour is already available to a number of Google's competitors today." Commission Decision 139/2004 of Nov. 3, 2018, Case M.4731 Google/DoubleClick, http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf [https://perma.cc/WW7V-NBGC].

4. Peter Swire, *Protecting Consumers: Privacy Matters in Antitrust Analysis*, CTR FOR AM. PROGRESS (Oct. 19, 2007) https://www.americanprogress.org/issues/economy/news/2007/10/19/3564/protecting-consumers-privacy-matters-in-antitrust-analysis/ [https://perma.cc/WW7V-NBGC].

5. *See, e.g.*, MAURICE STUCKE & ALLEN GRUNES, BIG DATA AND COMPETITION POLICY 259-260 (Oxford Univ. Press) (2016) (discussing "how privacy can be viewed as a parameter of quality competition.").

illustrates how merger reviews can assess privacy through an examination of two recent merger reviews involving digital platforms: the European Commission's decisions in their reviews of the Facebook/WhatsApp merger[6] and the Microsoft/LinkedIn merger.[7]

This Article avoids embracing the neo-Brandeisian antitrust reform perspective, which has given a huge impetus to the growing discussion of privacy and antitrust. The neo-Brandeisian movement urges antitrust enforcers to look beyond the consumer welfare standard that has guided antitrust law and policy for several generations.[8] According to this perspective, if antitrust should consider issues such as wage inequality, political corruption, and the power of companies to influence elections, then surely the protection of privacy in the age of big data is also within scope.[9]

The problem, however, is that this broader neo-Brandeisian perspective requires reform of antitrust law. In particular, it would need adjustment of merger review standards, which would be a long and uncertain process. Legislative reforms to improve privacy might ultimately be needed. After all, the conclusion of this Article is that it might be wiser to look elsewhere than current merger reviews if we want to address the privacy concerns that are a focus of such widespread public concern. But before going that route, it might be helpful to see how far we can get without a legislative adjustment to antitrust law.

Instead, this Article adopts the traditional antitrust perspective that merger reviews can examine privacy as an element of competition and take steps to preserve this privacy competition by blocking or conditioning proposed transactions that substantially lessen this form of competition. It also seeks to assess, however, the realistic prospects for making progress on privacy in this way.

The implications of this assessment should not give us cause for optimism. Any exercise of antitrust merger review mechanisms to address privacy concerns necessarily confronts a range of legal, factual, and practical considerations that collectively amount to large and potentially insurmountable obstacles. These include the inability to apply or extend privacy law directly, the unresolved conceptual knots in clarifying the notion of privacy competition, the empirical difficulties in determining the existence and extent of privacy competition, and the requirement to show that any post-merger failure to satisfy privacy preferences results from a substantial lessening of competition, rather than from independent business judgements

---

6. Commission Decision of Oct. 3, 2014, Case M.7217 Facebook/WhatsApp [hereinafter EU Commission Decision, Facebook/WhatsApp], http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf [https://perma.cc/8BWF-G53W].

7. Commission Decision of Dec. 6, 2016, Case M. 8124 Microsoft/LinkedIn [hereinafter EU Commission Decision, Microsoft/LinkedIn], http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf [https://perma.cc/WZ4N-RFBQ].

8. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009 (2013).

9. *See* Khan, *supra* note 8.

or the proper operation of competitive forces.[10] Finally, merger reviews face a fundamental legal limitation in the form of an inability to introduce new competition into the marketplace.[11] This makes it highly unlikely, though not impossible, for merger reviews to increase privacy protections beyond what would already be provided for in the marketplace.

The topic of antitrust and privacy is broad, and this Article deals only with a fraction of the possible overlap—the role of privacy competition in merger reviews. Another area of overlap concerns whether data sets themselves are such crucial competitive assets that antitrust authorities should block or condition mergers that create very large concentrations of data, or take other steps to limit anticompetitive unilateral conduct based on monopoly control of data.[12] In principle, antitrust action to reduce the size or exclusive access to data sets to preserve competition could limit privacy risks. It is important to be aware, however, that competition remedies to data control issues do not necessarily work in favor of privacy protection. Some merger conditions or other measures to remedy dominant positions in the control of competitively essential data, such as mandated data sharing, might create additional privacy risks, for example, by requiring the transfer of information a customer shared with one company to a company with less privacy protective data practices.[13]

A further intensively discussed overlap is whether antitrust action against abuse by dominant companies can impose data protection requirements—such as additional consent requirements—that are effectively more stringent than the data protection rules that have to be followed by non-

10. *See* Section II B-H infra.

11. *See* Section II A infra.

12. Considering data as an asset will be increasingly important in merger reviews, but it is not the same as assessing privacy competition in merger reviews. The key question in thinking of data as a key asset is whether there will be enough of it left over after the merger for rivals to compete fairly. That is different from the question of whether companies compete over privacy. Data as a competitive asset was a focal point of the FTC's merger review of the Google/DoubleClick merger. *See* FTC Statement, Google/Doubleclick, *supra* note 3. It was an issue in the European Commission reviews of Facebook and WhatsApp as well as Microsoft and LinkedIn. *See* EU Commission Decision, Facebook/WhatsApp, *supra* note 6; EU Commission Decision, Microsoft/LinkedIn, *supra* note 7. In each case, discussed below in Sections III and IV, the reviewing authority approved the merger after finding that post-merger there would be adequate data left over for advertising rivals.

13. Viktor Mayer-Schönberger & Thomas Ramge, *A Big Choice for Big Tech: Share Data or Suffer the Consequences*, FOREIGN AFFAIRS (Aug. 13 2018), https://www.foreignaffairs.com/articles/world/2018-08-13/big-choice-big-tech [https://perma.cc/3Y6E-B2CB].

dominant companies.[14] This might not improve matters for all companies, but like merger conditions that effectively imposed net neutrality obligations on merging communications companies, they remedy special problems created by mergers or strong market positions.[15]

An assessment of these other areas might yield other ways in which antitrust enforcers could improve privacy protection. But they are outside the scope of this Article and hopefully will be dealt with in future work.

It is certainly legitimate for antitrust authorities to take privacy into account in merger reviews in certain circumstances. It is not bad policy to do this, but such efforts are not likely to improve privacy very much. If we want more privacy than current law requires, and more than companies would normally provide on their own, we will need to establish it through other resources available to competition law or directly through new national privacy legislation.

In Section II, this Article makes general remarks about the relationship of traditional merger review and privacy. In Sections III and IV, this Article discusses the European Commission's review of the Facebook/WhatsApp merger and the Microsoft/LinkedIn merger to reveal how they treated privacy as an element of competition. Section V reviews some lessons learned from these cases, and Section VI concludes that merger reviews should not be

---

14. In an abuse of dominance case, the German Federal Cartel Office required Facebook to get affirmative consent for collecting and merging third-party and affiliate data from users. Facebook FAQ, Bundeskartellamt (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6 [http://perma.cc/2CHY-NVP7]; B6-22/16 - *Case Summary: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing* (Feb. 15, 2019) [hereinafter *Case Summary: Facebook*], https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 [http://perma.cc/B6VW-MZXG]; Press Release, *Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources* (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html[http://perma.cc/2H8E-8E77]. *See also* Dr. Jörg Hladjk et al., *The German Facebook Case – Towards an Increasing Symbiosis Between Competition and Data Protection Laws?*, CPI ANTITRUST CHRONICLE (Feb. 2019), https://www.competitionpolicyinternational.com/wp-content/uploads/2019/02/CPI-Hladjk-Werner-Stoican.pdf [https://perma.cc/W42Q-MQ9Y]. On August 26, 2019, the Düsseldorf Higher Regional Court suspended the competition authority's ruling. *See* The Decision of the Higher Regional Court of Düsseldorf, Case VI-Kart 1/19 (V) (Aug. 26, 2019) [hereinafter Düsseldorf Decision], https://www.d-kart.de/wp-content/uploads/2019/08/OLG-Düsseldorf-Facebook-2019-English.pdf [https://perma.cc/Z2BU-XE2P] (English translation). A different example comes from the FCC's now-repealed broadband privacy rules imposing opt-out consent for dominant broadband companies. *See* News Release, FCC Adopts Broadband Consumer Privacy Rules, FCC (Oct. 27, 2016), https://www.fcc.gov/document/fcc-adopts-broadband-consumer-privacy-rules [https://perma.cc/8FKL-DK9L].

15. Because the merged entity controlled both cable systems and a leading ISP (AOL) that relied on open access to cable to reach its subscribers, the FTC's consent order required it to provide non-discriminatory access to its cable systems for ISPs competing with AOL and prohibited it from interfering with the content provided by competing ISPs. *See* America Online, Inc. & Time Warner Inc., F.T.C. Dkt. No. C-3989 (Apr. 17, 2001), https://www.ftc.gov/sites/default/files/documents/cases/2001/04/aoltwdo.pdf [http://perma.cc/S5NX-6FRL].

relied upon as a significant legal mechanism securing the maintenance of privacy protections. The results of this Article strongly suggest that it would be better to turn to other aspects of antitrust law or to privacy law itself to vindicate privacy rights.

II. General Remarks

A. *Traditional Antitrust Merger Review Preserves, But Does Not Enhance, Competition.*

Merger reviews under traditional antitrust principles seek to block the loss of competition. Section 7 of the Clayton Act bars any acquisition with an effect that "may be substantially to lessen competition, or to tend to create a monopoly."[16] The "unifying theme" of the Justice Department's 2010 Horizontal Merger Guidelines is that "mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[17]

European competition law is similar. Under the European Council's Merger Regulation:

> [A] concentration which would not significantly impede effective competition . . . shall be declared compatible with the common market . . . [and] . . . a concentration which would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.[18]

Thus, the touchstone of antitrust merger review is the preservation, not the enhancement of existing competition. Reviewing agencies do not have the capacity to block a transaction on the grounds that it does not introduce new

---

16. 15 U.S.C. § 18 (2018).

17. U.S. DEP'T JUST. & FTC, HORIZONTAL MERGER GUIDELINES 2 (2010) [hereinafter "DOJ 2010 Merger Guidelines"], https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [http://perma.cc/Q7MR-9T8W]. The FTC's retrospective 2007 study of the success or failure of merger remedies defined success as "maintaining or restoring competition[,]" that is, "competition in the relevant market remained at its pre-merger level or returned to that level within a short time (two to three years)." FTC, THE FTC'S MERGER REMEDIES 2006-2012 15 (January 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf [https://perma.cc/WK2Z-BXD5]. Even proposed reforms of merger enforcement do not change this focus on avoiding the lessening of competition, rather than enhancing it. *See, e.g.*, S. 1812, Consolidation Prevention and Competition Promotion Act of 2017, introduced by Senator Amy Klobuchar (D-MN), September 14, 2017, https://www.congress.gov/bill/115th-congress/senate-bill/1812 [https://perma.cc/M4XN-7QFB] (changing the standard from "substantially lessens competition" to "materially lessens competition in more than a de minimis amount.").

18. Council Regulation (EC) No 139/2004 of Jan. 20, 2004, *The control of concentrations between undertakings (the EC Merger Regulation)*, OJ L 24, 29.1.2004, Article 2(2) and Article 2(3), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN [https://perma.cc/6TXC-3F29].

competition that was not previously there.[19] A merger review is forward-looking only to the extent that is does not want to allow the competitive future to be worse than the past.

This is in contrast to the standard of review that applies to mergers under the jurisdiction of some sector-specific regulatory agencies. For instance, the FCC reviews mergers when they involve the assignment and transfer of control of certain spectrum licenses and approves them only when it determines that they serve the "public interest, convenience and necessity."[20] The FCC can and does apply traditional analysis relating to the loss of competition in its merger reviews, but it also must make a broader public interest determination. In particular, the FCC considers "whether a transaction will enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue."[21]

As a result of this fundamental difference, the best that might be expected from traditional antitrust merger reviews is that they will block or condition mergers that would substantially weaken the privacy competition that existed in the market prior to the merger. It is hard to see how a traditional antitrust merger review could condition a merger so as to require companies to provide customers with improved privacy protections that they previously did not enjoy.

Despite this obstacle, it is possible to imagine circumstances in which a merger condition imposed purely to remedy a competition problem could have the effect of improving privacy protection. For instance, as described in the German antitrust case against Facebook, the social media company requires its users to accept tracking on third-party websites as a condition of using its service.[22] An antitrust authority could, of course, simply block the merger as anticompetitive, and this would leave privacy protections exactly the way they were before the proposed merger. But it could also seek to offset that anticompetitive effect by prohibiting the merged entity from combining third-party tracking data with data from activity on the social media site or requiring it to get separate consent to do so. That is, it could try to require the social media company to be more protective of its existing users' privacy as a condition of approving the merger. This would have the effect of improving

---

19. *Id.*; 15 U.S.C. § 18, *supra* note 16; DOJ 2010 Merger Guidelines, *supra* note 17, at 2.

20. FCC, *Applications of Comcast Corp., Gen. Elec. Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, ¶23-24 (2011) [hereinafter FCC, *Comcast, Gen. Elec. & NBC*, Memo], https://www.fcc.gov/document/applications-comcast-corporation-general-electric-company-and-nbc-1 [http://perma.cc/99NY-3NPA]. *See also* Jon Sallet, FCC, *FCC Transaction Review: Competition and the Public Interest* (2014), https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest [http://perma.cc/4G97-RPAU].

21. FCC, *Comcast, Gen. Elec. & NBC*, Memo, *supra* note 20, at 11.

22. *See Case Summary: Facebook*, *supra* note 14. *See also* Terms of Service, FACEBOOK (last accessed Apr. 28, 2020) https://www.facebook.com/terms.php [https://perma.cc/SJ6B-EM8G].

privacy protection for its existing users, as well as protecting competitors in the advertising market.[23]

This example suggests that it is possible for traditional antitrust authorities to seek in the context of a merger review to improve the state of privacy protection beyond what is already being provided in the market. This possibility seems to arise where the antitrust authority could establish that a merger would lessen competition due to a combination of data that foreclosed competition. With the growth of data as a competitive asset in today's digital economy, this might not be rare. Still, the antitrust authority would need to explain why prohibiting the combination of data wouldn't be sufficient to resolve the issue, rather than improving privacy protections for existing users. This might be an uphill climb both legally and factually. My sense is that while an activist antitrust authority might try to improve privacy protections in this way, it would be unlikely to succeed.

B. Advancing Privacy Protections is Not a Legitimate Objective of Traditional Antitrust Merger Reviews

As discussed further in this section, traditional antitrust merger review has no authority to consider extraneous factors, such as privacy, independently of the transaction's effect on competition.[24] Not only is it unlikely to advance privacy values beyond what would occur in the marketplace, it may not independently consider such matters at all.

This contrasts with transaction reviews conducted by some specialized agencies. When the FCC reviews mergers, it is required to take into account values other than competition including ensuring a "diversity of sources of information" and "whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers."[25]

In its Google/DoubleClick decision, the FTC articulated this notion that merger reviews can aim only at preserving competition, not preserving or enhancing other values:

---

23. This is the fact pattern in the German FCO's case against Facebook altered to suppose that the merging companies sought to achieve a dominant position through merger rather than attaining it through organic growth. *Case Summary: Facebook*, *supra* note 14. I am imagining in this hypothetical that the merger review authority focuses only on protecting competition in the advertising market, not on improving privacy protection as such.

24. *See infra* notes 26 and 27.

25. *See* Sallet, *supra* note 20.

> The Commission has been asked before to intervene in transactions for reasons unrelated to antitrust concerns, such as concerns about environmental quality or impact on employees. Although such issues may present important policy questions for the Nation, the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition.[26]

This view has the backing of Supreme Court precedent. In *United States v. Philadelphia National Bank*, the Court ruled that the effect upon competition is the sole criterion to determine whether a merger violates Section 7 of the Clayton Act.[27] The fact that the merger would increase employment in a particular city was deemed irrelevant.[28]

European competition law enforcers take the same general view. For instance, the European Commission adopted it in its review of the Facebook/WhatsApp merger:

> Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.[29]

The European Court of Justice upheld this view of the relationship between competition law and data protection law: "[S]ince . . . any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection."[30] This is the antitrust consensus even today. Antitrust scholar Carl Shapiro recently said: "Antitrust is not designed or equipped to deal with many of the major social and political problems

---

26. FTC Statement, Google/Doubleclick, *supra* note 3, at 2.

27. 374 U.S. 321 (1963).

28. This decision is famous for establishing the since-modified quick-look standard that used increased concentration as a test for lessening competition: "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.* at 363. But it also rejected the idea that merger reviews could go beyond the standard of lessening competition to take into account other "social or economic" effects of a proposed merger: "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *Id.* at 371.

29. *See* EU Commission Decision, Facebook/WhatsApp, *supra* note 6, at par. 164.

30. Case C-238/05 – , Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbanc), [2006] E.C.R. I-1116425, par. 63, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0238&from=EN [https://perma.cc/KYU2-SN6K].

associated with the tech titans, including threats to consumer privacy and data security, or the spread of hateful speech and fake news."[31]

Moreover, the recent Common Understanding among the G7 competition authorities also repeats the point that: "[G]overnments should avoid using competition law enforcement to address non-competition objectives . . . ."[32]

Of course, an agency review that blocks a merger on the grounds that it would substantially lessen competition in the advertising market might also preserve data practices that people value as privacy protective. In a similar way, conditions on a merger designed to preserve competitive conditions in the advertising market after the merger might also preserve valued data practices, as in the social media example sketched above. Antitrust practitioners likely would not look askance upon merger controls that accidentally preserved privacy in this way.

On the other hand, these possibilities should not give much comfort to the proponents of using merger reviews to protect privacy, since it would be only a coincidence that merger controls aiming to preserve competition also improve privacy. Privacy advocates would want more from privacy-aware merger reviews than this sort of accidental privacy protection.

C. *Relationship of Privacy Law to Merger Review*

This general point that merger reviews are focused on preserving competition, not enhancing or maintaining privacy, has several implications that are worth emphasizing. One is that merger control reviews do not apply or enforce existing privacy law. A second is that data collection practices of the merging companies must be viewed as satisfying current legal requirements. Third, any merger requirements for data practices that exceed current legal privacy requirements must be justified as necessary to sustain competition. They cannot be based solely on the idea that they constitute better privacy protection.

Traditional antitrust merger reviews apply the standards of competition law, not the requirements of privacy or data protection law.[33] In the cases we consider below the European Commission reviewed potential mergers between companies that, prior to the merger, were in full compliance with European data protection law. There was no question of using merger review as a way to bring non-compliant companies into compliance with data protection law.

---

31. Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPS. 69, 79 (2019).

32. FTC, G7 France, Common Understanding of G7 Competition Authorities on 'Competition and the Digital Economy' (June 5, 2019) https://www.ftc.gov/system/files/attachments/press-releases/ftc-chairman-supports-common-understanding-g7-competition-authorities-competition-digital-economy/g7_common_understanding_7-5-19.pdf?utm_source=govdelivery [https://perma.cc/NAT3-9JDE].

33. *Supra* Section IIA.

Both the US and Europe have extensive legal structures aimed at promoting privacy. In its complaint to the FTC in connection with the Google/DoubleClick merger, EPIC properly noted that: "The right of privacy is a personal and fundamental right in the United States."[34] Privacy is also regulated by specialized agencies, the FTC, and a variety of state laws, including the recently passed California Consumer Privacy Act of 2018.[35] In Europe, the General Data Protection Regulation (GDPR), adopted in 2018, provides a comprehensive framework to vindicate what European law regards as the fundamental rights to privacy and data protection.[36]

But in assessing mergers through the lens of privacy, compliance with privacy law is not at issue. The question before the reviewing agency is not whether companies comply with privacy law. The question is whether the merger substantially lessens competition, and in doing so whether it harms consumers, including whether the loss of competition deprives them of privacy choices they previously had and valued.[37]

This is not to say that competition law in general in Europe is powerless to apply data protection law. The European Commission's practice of avoiding data protection enforcement in merger reviews is in sharp contrast to the approach taken by Germany's Federal Cartel Office (FCO) in its action against Facebook. In that case, the FCO claimed authority to act as an enforcer of the European GDPR.[38] It determined that Facebook needed consent from its users to combine third-party data with its data from user interactions on Facebook's own service.[39] Because of its dominance in social media, the take-it-or-leave it form of choice it provided did not amount to genuine consent. And it imposed a data protection remedy in the form of a separate consent requirement.[40]

But this was a case of abuse of dominance, not a merger review, and it was brought under German law, not European competition law. It is not clear that the same legal opportunity arises for merger reviews in light of *Asnef-Equifax,* a decision by the European Union Court of Justice, which held that: "[I]ssues relating to the sensitivity of personal data are not, as such, a matter for competition law."[41] As a result, at this point merger reviews are not an occasion for enforcement of privacy laws in Europe.

This means that the data practices assessed in the context of a merger review are all legal practices. These practices might involve greater or lesser collection and use of data, and a corresponding increase or decrease in product or service personalization. But they are all within the parameters allowed by

---

34. EPIC Complaint, *supra* note 1, at 2.
35. Cal. Civ. Code § 1798.100-198.
36. *See* Regulation 2016/679 of Apr. 27, 2016, on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), https://publications.europa.eu/en/publication-detail/-/publication/3e485e15-11bd-11e6-ba9a-01aa75ed71a1/language-en [https://perma.cc/3L9R-L3FU].
37. *See* infra Section IIH.
38. *See Case Summary: Facebook*, *supra* note 14.
39. *Id.*
40. *Id.*
41. *Supra* note 30.

existing privacy and data protection law. In so far as merger reviews under competition law are concerned, no data practice that is legal under data protection law has a preferred status.

Merger reviews can take privacy into account, but not directly, by ascertaining whether the rivalry among companies in the markets affected by a proposed transaction takes place significantly along the dimension of these differing but legal data practices. And if a merger review finds the existence of significant privacy competition, it then needs to assess whether measures are needed to preserve that competition in a post-merger world.

This point affects some of the language used to describe the way in which merger authorities can take privacy into account. Peter Swire, for example, describes the consumer loss connected to loss of privacy competition as "privacy harms."[42] This phrase suggests to me that the company has used data in a way that violates consumer privacy rights and that it is a legitimate role of merger analysis to take these privacy law violations into account in assessing a merger.

But the consumer harm involved, if any, is not that the companies are violating consumer privacy rights, but that they are not satisfying consumer privacy preferences. This failure to satisfy consumer privacy preferences, even when there is no legal obligation to do so, is likely what Swire intends by the phrase "privacy harm." But it has, to my ear anyway, suggestions of illegality under privacy law.[43]

Finally, some advocates think that merger reviews should consider possible improvements in privacy law that might more adequately vindicate the fundamental right to privacy.[44] An opt-in form of consent might be more protective of privacy than opt-out, for instance, and so a merger review might contemplate imposing that requirement as a merger condition, even if it is not required by current privacy law. The merging of separate data sets might create new privacy risks in the form of new and more detailed consumer profiles. These collections of data might be entirely legal under existing privacy law, but a merger review might block a transaction that would merge these data sets or might condition the merger on maintaining them in a separate non-linkable form. The reviewing agency might think it would be better for the merging companies to face privacy rules that go beyond their current legal obligations under privacy law.

But these measures would be unavailable to merger reviewing agencies if aimed at improving privacy protections instead of maintaining competitive conditions. The FTC recognized this restriction on advancing privacy interests in the context of merger reviews, saying in its decision on

42. *See* Swire, *supra* note 4.

43. *Id.*

44. EPIC seems to take this view in its Congressional testimony that merger reviews can legitimately impose merger conditions that exceed current privacy law. *See An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?*, *Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, of the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Marc Rotenberg, President, EPIC).

Google/DoubleClick: "[T]he Commission lack[s] legal authority to require conditions to this merger that do not relate to antitrust . . . ."[45]

This is not to say that privacy law is perfect and cannot be improved. It is rather that needed improvements of privacy law are not within the scope of traditional merger reviews.

D. Privacy Can Be Legitimately Treated as an Aspect of Competition in Merger Reviews

Despite constraints on the ability of merger reviews to advance privacy interests, there is a way forward for merger reviews to account for privacy. Merger control might advance privacy interests by rejecting or conditioning a merger that would restrict consumer choice of stronger privacy practices. This would have the effect of maintaining privacy protections that the merger might eliminate because it would block or condition a merger that would absorb or marginalize a competitor with more privacy protective data practices.

This approach treats privacy as a non-price aspect of competition. Merger reviews are not limited to examining whether the merged entity could impose an anticompetitive price increase unrelated to an improvement in quality. A company might choose to exercise its post-merger market power by a cost-saving reduction in the quality of its product or service. It might also reduce its efforts to innovate, since it no longer faces the prospect that strong competitors will steal customers by introducing new features that make the product or service faster, more convenient, or easier to use. Merger reviews can investigate whether the resulting market conditions would allow any substantial reduction in competition along any dimension of product or service quality that is valued by consumers and that forms the basis for rivalry between competing firms.

The DOJ Merger Guidelines countenance steps that would enable reviewing agencies to consider privacy in the context of merger reviews.[46] They note that impermissible increases in market power following a merger can be manifested in "non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation."[47] Data practices that adversely affect consumer privacy preferences could be considered one of these "non-price terms and conditions."[48]

The Guidelines explicitly recognize that the loss of product variety is a cognizable antitrust harm: "If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product."[49] The loss of a service

45. FTC Statement, Google/Doubleclick, *supra* note 3, at 2.
46. DOJ 2010 Merger Guidelines, *supra* note 17.
47. *Id.* at 2.
48. *Id.*
49. *Id.* at 24.

providing strong privacy protections following a merger might be viewed as a reduction in product variety and taken into account in a merger review.

Companies could compete on privacy in any number of ways: providing clearer, easier to read descriptions of their data collection practices, allowing choice about data use in a wider range of circumstances, adjusting the choice architecture to provide for opt-in rather than opt-out choice, allowing secondary use only with affirmative opt-in consent, not sharing customer data for third-party marketing, minimizing the data collected and discarding it after its initial use. When differences in these privacy practices are valuable for consumers and a basis for choice among competing products or services, they are a dimension, aspect, or parameter of competition.

Traditional antitrust officials increasingly accept the idea that privacy can be an aspect or dimension of competition. Former FTC Commissioner Maureen Ohlhausen has written: "Privacy therefore increasingly represents a non-price dimension of competition." [50] European Commission competition officials Eleonora Ocello and Cristina Sjödin say that in digital markets, "the degree of privacy afforded by the platform (i.e. the type of data protection policy in place) may thus become a relevant parameter of competition."[51] The current head of the DOJ Antitrust Division, Makan Delrahim, has also supported this view: "[C]onsumers may choose . . . online search services based on more accurate results or greater privacy protections."[52] Proponents of incorporating privacy considerations into antitrust enforcement such as Maurice Stucke and Allen Grunes agree with this framework whereby privacy can be incorporated into merger control analysis, accepting as a touchstone "the requirement that privacy be an 'important' factor in the decision to purchase or a 'key' parameter of competition."[53]

As a result, notwithstanding the general principle that competition policy is concerned solely with protecting competition, when privacy is a "main" or "key" or "important" element in consumers' decisions to purchase a good or service, a merger that eliminated or reduced competition along this non-price dimension could be blocked or conditioned under antitrust law. This possibility means merger reviews could in principle maintain privacy-protective data practices that already exist in the marketplace.

---

50. Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and The Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 151 (2015).

51. Eleonora Ocello & Cristina Sjödin, *Digital Markets in EU Merger Control: Key Features and Implications*, CPI, ANTITRUST CHRONICLE, at 5 (Feb. 2018), https://www.competitionpolicyinternational.com/digital-markets-in-eu-merger-control-key-features-and-implications/ [https://perma.cc/8G8F-BC23].

52. Makan Delrahim, Assistant Attorney-General, Speech at the Silicon Flatirons Annual Technology Policy Conference at The University of Colorado Law School, *"I'm Free": Platforms and Antitrust Enforcement in the Zero-Price Economy* (Feb. 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons [https://perma.cc/HFY3-485D].

53. STUCKE & GRUNES, *supra* note 5, at 131.

E. Some Conceptual Points

Noting that privacy can be considered as a feature or parameter of competition invokes the question of how to do it. An important first step is to develop a concept of privacy that is suitable for merger control analysis.

European competition policy officials involved in the Commission's review of the Facebook/WhatsApp merger offer a common conceptualization of how to treat privacy as an element of competition in a merger review case:

> In two-sided markets, where products are offered to users for free and monetised through targeted advertising, personal data can be viewed as the currency paid by the user in return for receiving the 'free' product, or as a dimension of product quality. Hence, a website that, post-merger, would start requiring more personal data from users or supplying such data to third parties as a condition for delivering its 'free' product could be seen as either increasing its price or as degrading the quality of its product. In certain circumstances, this behaviour could arguably amount to an infringement of competition law (irrespective of whether or not it also constitutes an infringement of data protection rules). However, while technically viable, this theory of harm could only be relevant in those cases where privacy is an important factor in the decision to purchase a product or service, i.e. a key parameter of competition.[54]

As this quotation illustrates, these Commission officials conceptualize data collection and use as a reduction in the quality of a service. In doing this, they are accepting a widespread notion that data collection and use is a uniformly negative phenomenon or, equivalently, that a decrease in data collection and use is intrinsically a good thing. Privacy becomes like product safety or the power of a car engine, something that all consumers would likely want more of rather than less. This conception of privacy as a loss of product quality feeds into merger reviews because degradation of quality is a consumer loss that can be considered in merger reviews.[55]

But is it really useful for merger reviews to think of a decreased flow of information as uniformly a good thing? Is a company that collects more information really, objectively, and for that reason alone, providing a worse product or service?

For merger review purposes it is much more realistic to think of privacy as subjective in that it "may be valuable only to some consumers, or more

---

54. Eleonora Ocello et al., *What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU Merger Case*, Competition Merger Brief 1, 6 (2015) http://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf [https://perma.cc/7SRY-69QU].

55. *See* Swire, *supra* note 4.

valuable to some than others."[56] Whether a company collects a lot of data or a small amount of it is as objective a fact as the engine power or color of a car. The data practices of data collection, choice architecture, data minimization and retention, and so on are all objective conditions that in principle are observable. What is subjective is the value that people place on these practices.

Alan Westin's surveys over a thirty-year period show substantial variation in the value people place on privacy. Some people value privacy highly in almost all circumstances (the privacy fundamentalists, roughly 25%), some are largely indifferent (the privacy unconcerned, roughly 25%), and the rest (the privacy pragmatists, about 50%) say it depends on the context.[57]

Moreover, people's responses to survey questions likely do not match their marketplace behavior. A solid line of research has shown the existence of a "privacy paradox: users claim to be very concerned about their privacy but do very little to protect their personal data."[58] This well-established phenomenon makes it difficult to assume universal agreement that more privacy and less data collection is inherently good.

The variation in consumer preferences in surveys and the lack of fit between those surveys and actual consumer behavior might very well be attributable to market defects in the provision of adequate information to allow a timely and informed privacy choice. Consumers might never be able to develop an adequate and timely understanding of information uses simply because of the complexities of modern data collection and analysis techniques. Moreover, companies might be using overly complicated legalistic notices to discourage proper understanding and might design websites and apps deceptively through the use of "dark patterns" to encourage information sharing that might not be in the best interests of consumers or reflect their true preferences.[59]

---

56. Organization for Economic Cooperation & Development, *The Role and Measurement of Quality in Competition Analysis,* Quality Report (2013) [hereinafter OECD Quality Report], http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf [https://perma.cc/M7HK-ZQYW].

57. Ponnurangam Kumaraguru & Lorrie Faith Cranor, *Privacy Indexes: A Survey of Westin's Studies*, SCH. OF COMPUT. SCIENCE, CARNEGIE MELLON UNIV. (Dec. 2005), http://reports-archive.adm.cs.cmu.edu/anon/isri2005/CMU-ISRI-05-138.pdf [https://perma.cc/W6MM-LJ6G]. Recent survey research confirms this variation in privacy preferences, especially when combined with increased personalization services. *See* Phyllis Rothschild et al., *Why Personalization Matters for Consumer Privacy*, MIT SLOAN MGMT REV. (June 6, 2019), https://sloanreview.mit.edu/article/why-personalization-matters-for-consumer-privacy/.

58. *See* Susanne Barth & Menno D.T. de Jong, *The privacy paradox – Investigating discrepancies between expressed privacy concerns and actual online behavior – A systematic literature review*, 34 TELEMATICS & INFORMATICS 1038 (2017), https://www.sciencedirect.com/science/article/pii/S0736585317302022 [https://perma.cc/U7WY-E92W].

59. Norwegian Consumer Councils, *Deceived by Design: How tech companies use dark patterns to discourage us from exercising our rights to privacy*, FORBRUKERRADET (June 27, 2018), https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf [https://perma.cc/ZL2X-FFTW].

But it is not clear how to bring these insights to bear in a merger review. These marketplace defects would be more appropriately remedied through additional consumer protection measures designed to provide consumers with adequate and timely information. Indeed, that is the purpose of many privacy laws. A new law might also be needed to prevent deceptive dark pattern.[60] But these reforms cannot be implemented as part of a merger review. For merger control purposes, preferences expressed in measures of marketplace demand have to be assumed to reflect real preferences.

Competition law has to conceive of privacy as a feature of a service that is offered to consumers on the market. People have different preferences for different economic goods, including differing preferences in connection with privacy. Those differences must be acknowledged when engaged in competition analysis.

As a result, in an assessment of competition in privacy for merger review purposes, people have to be viewed as having privacy tastes in the same way that they have color tastes or food tastes. It is no more legitimate from the point of view of assessing marketplace privacy competition to say that privacy protective practices are higher quality than it is to say, without any evidence from surveys or other assessments of effective actual consumer preferences, that blue cars are of higher quality than yellow cars or that corn is better than green beans.

James Cooper provides an additional perspective on why increasing data collection and use might not always amount to a reduction in product quality. He suggests that data collection and use is an intermediate good, an input that companies use to improve the overall quality of their product and services:

> Taking additional consumer data is not the same as skimping on quality, because collecting, storing, and analyzing data is an additional cost. For the publisher, improved data is an investment. The publisher hopes to enhance its revenue by using the additional data to improve the quality of its content and through selling more finely targeted ads.[61]

The result is that consumers are offered additional benefits associated with the additional data collection. It is that bundle that consumers are asked to evaluate, not the additional data collection all by itself. As Cooper notes, consumers do not reach a uniform judgment about the value of these bundles:

---

60. *See, e.g.*, S. 1084, 116th Cong. (2019).

61. James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1129, 1135-1136 (2013).

> Some consumers may care little about being tracked online or having Google read their e-mails, and they may derive great utility from easier searching and highly relevant ads. On the other hand, there are others who may detest targeted ads and the "creepy" feeling from knowing that their search and browsing histories are stored on multiple servers. For these people, data collection may well be a net reduction in quality.[62]

The key idea here is that data collection and use are inputs for production of goods and services. In the absence of a given level of data collection and use, the product or service would be different. In particular, it would differ in the level of personalization it would provide, that is, in the extent to which it was designed to satisfy the interests and preferences of the consumer.

Companies compile personal information about their customers or potential customers in order to tailor their services to their interests and needs and thereby make it more attractive to them and to increase their engagement with the service.[63] This is true of many digital companies such as search engines, social networks, and online marketplaces, whether they are general marketplaces selling a variety of products or providing specific services such as streaming music or videos. In a social network, for instance, the additional data collection and use make possible recommendations for content and contacts that better match the interests of the user. In networks supported by targeted advertising, the data collection and use also powers ads that are more likely to be of interest to the user.

This use of data to personalize services is broader than digital companies, and broader than two-sided markets for "free" goods. To name just two other sectors, healthcare providers use data to personalize medicine[64] and educators use data to personalize education.[65] The oddity of conceptualizing data collection and use as a quality degradation is perhaps more apparent in these cases where such a conception would have to treat the increases in the quality of medicine and education from personalization as a decline in service quality.

The same point arises from consideration of traditional ways personal information is used to provide services. Sharing personal, and sometimes sensitive, information with your doctor, lawyer, counselor, or bank in order to get services relevant to your situation is the only way to get the services, or at least to get them in a form that provides real value. It is hard to see such information sharing as intrinsically reducing the quality of the service provided.

---

62. *Id.* at 1137.
63. *See, e.g.*, Terms of Service, FACEBOOK, *supra* note 22.
64. *See, e.g.*, Irene Dankwa-Mullan, *Examining health disparities in precision medicine*, IBM (Oct. 14, 2019), https://www.ibm.com/blogs/watson-health/examining-health-disparities-in-precision-medicine/ [https://perma.cc/KZ6S-B7SX].
65. *See, e.g.*, U.S. Dep't of Education, Office of Educational Technology, Learning (last accessed Apr. 29, 2020) https://tech.ed.gov/netp/learning/ [https://perma.cc/2WNS-ES6L].

Privacy conceived of as limited data collection and use often operates at the expense of personalization. The two vary inversely. As privacy goes up, personalization goes down, and vice versa. Consumers typically purchase a bundle, not privacy as an isolated feature of a product or service. The range of possible bundles a company could offer would extend from one extreme of very high personalization and data collection to the other extreme of very low personalization and data collection.[66]

Economist Joseph Farrell has a different perspective on these conceptual issues.[67] He understands that privacy comes bundled with a service but conceives of this bundling as productively inoperative, a feature that can be arbitrarily added or removed from the service without making any difference to its other features that consumers might value.[68] In his view, book-selling companies might attach a privacy policy allowing them to collect and use information or not, with no other difference to the consumer in the service that the book-selling company offers.[69]

It is this assumption—that data collection and use has no role in the production of the service—that allows him to assert, as a key element in his economic model of privacy as "just another good" that: "A book, bundled with privacy policy B, is a less attractive good than the book bundled with privacy policy A," where B allows greater data collection and use and A allows less.[70] In fact, a book-selling service that collects substantial information about its purchasers is able to make recommendations that might match the consumers' interests and tastes far more effectively than a service that discards this information, and might therefore provide a service that is more valued, not one that is automatically inferior because of its greater data collection practices.

It is true that in some circumstances, data collection could be completely disconnected from the provision of the service. This seems to be the case with the example Farrell has in mind of a publisher who simply sells consumer information to the highest bidder, without changing the nature or character of the books it sells or recommends.[71] But that is not the central case of data collection and use. Companies typically collect information about their customers to improve the service they provide and, when they are advertiser-supported, to target ads more closely to their interests.[72]

For this reason, Farrell's model of data collection and use as arbitrarily added to a final good is not likely to be of much help in merger reviews. Much more relevant is the conception of data collection as an intermediate good

---

66. Cooper, *supra* note 61, at 1137.

67. Joseph Farrell, *Can Privacy Be Just Another Good?*, 10 J. ON TELECOMM. & HIGH TECH. L. 251, 254 (2012).

68. *Id.* at 253. "[L]et's think about a firm selling a book to a consumer, and analyze choice of the firm's privacy policy governing later re-purposing of the consumer's information."

69. *Id.*

70. *Id.* at 254.

71. *Id.* at 253.

72. *See, e.g.*, Terms of Service, YOUTUBE, https://www.youtube.com/static?template=terms (last accessed Apr. 28, 2020) [https://perma.cc/T289-8CPZ].

which is used to produce a final service. It is this final service which consumers value, some more than others.[73]

Much conceptual work needs to be done on privacy as a form of competition. For example, data sharing could be viewed as the "price" that users pay for personalization of a service.[74] It could also be thought of as a form of labor or an asset that users provide to companies for which compensation is needed.[75] These conceptualizations need to be explored more fully and their place in merger reviews should be better understood.

In the meantime, a step toward conceptual clarity might come from rethinking the idea of privacy as an objective improvement in a product or service. It might be more useful to recognize that the value consumers place on privacy is subjective. Moreover, to understand the nature of privacy competition, it might be helpful in merger reviews to think of data collection and use as an input to the personalization of a service. Companies compete along this privacy-personalization frontier, offering consumers not simply more privacy or less privacy but a bundled choice of more privacy and less personalization or more personalization and less privacy. The preferences of consumers for these bundles then have to be assessed empirically as part of a merger review.

F. Empirical Requirements

This recognition that privacy preferences differ, in part because privacy comes bundled with personalization services, has important implications for the assessment of privacy competition in merger reviews. In particular, it implies that an observed difference in data practices cannot be assumed to reflect different levels of consumer value. Changes in consumer welfare resulting from changes in data practices have to be assessed empirically by assessing actual consumer preferences.

It is possible that changes in company data practices following a merger might constitute a significant consumer harm. However, this cannot be assumed as a matter of definition any more than—to use Cooper's example in a merger context—it could be assumed that a restaurant's post-merger

---

73. In his classic article, Richard Posner thinks of privacy and prying as intermediate goods, leading to other things that people value rather than valued for their own sake: "We could regard them purely as consumption goods, the way economic analysis normally regards turnips or beer; and we would then speak of a 'taste' for privacy or for prying. But this would bring the economic analysis to a grinding halt because tastes are unanalyzable from an economic standpoint." Richard A. Posner, *The Right of Privacy*, 12 GA L. REV. 393, 394 (1977). Farrell also thinks of the possibility of privacy as an intermediate good, when, for example, he mentions that withholding information can protect people from adverse decisions in credit and employment. But his model focuses on the marginal case of companies who collect data for no reason related to the customization of a service or its supporting adverting. *See* Farrell, *supra* note 67.

74. *See, e.g.*, SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM 52, PublicAffairs (2018) (attributing to tech companies the view, which she criticizes, that privacy is "the price one must pay for the abundant rewards of information, connection, and other digital goods when, where, and how you want them.").

75. *See, e.g.*, Imanol Arrieta Ibarra et al., *Should We Treat Data as Labor? Moving Beyond 'Free'*, 1 AEA PAPERS & PROCEEDINGS, 1 (May 2018).

decision "to replace corn with green beans on its menu" would constitute a consumer harm that needs to be assessed in a merger review.[76]

Even if privacy is conceptualized as an increase in product quality, the size of the increase must be assessed empirically. As the European Commission competition officials said after outlining their view of data collection as intrinsically harmful: "However, while technically viable, this theory of harm could only be relevant in those cases where privacy is an important factor in the decision to purchase a product or service, i.e. a key parameter of competition."[77] That is, even if merger reviewing authorities assume that increased data collection degrades product quality, there still remains the empirical question of how large this effect might be.

Swire recognizes this point as well. About the Google/DoubleClick merger, he says:

> If the merger is approved, then individuals using the market leader in search may face a search product that has both "deep" and "broad" collection of information. For the many millions of individuals with high privacy preferences, this may be a significant reduction in the quality of the search product—search previously was conducted without the combined deep and broad tracking, and now the combination will exist. I am not in a position to quantify the harm to consumers from such a reduction in quality.[78]

Let me emphasize that in this quotation Swire says that a merger creating more data collection "may be a significant reduction in the quality" of the product. He is not arguing that the merger would create this harm, merely that it is possible. In order to be considered in a merger review, such possible harm has to be demonstrated as actual and its size estimated.

Even if privacy is thought of as an increase in quality, it still might be that these differences in quality are too small to affect consumer behavior. A market investigation must assess and confirm that "privacy is an important factor in the decision to purchase a product or service."[79]

The FTC did such an assessment in its Google/DoubleClick merger review.[80] Despite its view that the prevention of harm to competition is the sole aim of merger review, the FTC also "investigated the possibility that this transaction could adversely affect non-price attributes of competition, such as

76. Cooper, *supra* note 61, at 1138.
77. Ocello et al., *supra* note 54, at 6.
78. Swire, *supra* note 4, at 6-7.
79. Ocello, *supra* note 54, at 6.
80. FTC Statement, Google/Doubleclick, *supra* note 3, at 2-3.

consumer privacy." It "concluded that the evidence does not support a conclusion that it would do so."[81]

To determine that privacy is an important parameter of competition, it is necessary to assess whether a significant number of people base market choices on their privacy preferences. Universality is not needed. As one commentator says: "[I]t seems unreasonable to conclude that protecting competition over privacy would require a finding that consumers are unanimous in their preference for additional privacy protections."[82] When large numbers of people make their decisions about the goods or services that they buy on the basis of the privacy practices of the companies involved, then privacy is a "key" or "important" parameter of competition in those markets.

The way to ascertain the value of privacy for merger review purposes is through consumer surveys or interrogation of the expert opinion of those involved in the marketplace and have experience in seeking to meet consumer demand as it manifests itself in consumer behavior.[83] Expert opinion might be preferable to asking people specific hypothetical questions about their preferences in connection with the merged company's data practices. Surveys in this area are especially unreliable, as the privacy paradox phenomenon shows.[84]

As described in the two case studies in Sections III and IV, obstacles to an accurate empirical assessment of the role of privacy in marketplace competition are formidable.[85] But if merger reviews are ever to be a reliable mechanism to address privacy concerns, they have to be faced and overcome.

G. Privacy Competition Can Be Reduced After a Merger in Several Different Ways

Consumer harm can take the form of a post-merger failure to satisfy consumer privacy preferences that were satisfied before the merger. And in

---

81. The extent to which this was a detailed, empirical investigation of whether privacy was an element of competition between Google and DoubleClick is unclear. It might have just been fall-out from the Commission's general conclusion that Google and DoubleClick did not compete at all: "Because Google and DoubleClick do not presently compete in the same relevant market these two companies do not act as significant competitive restraints on one another. In practical terms, this means that the parties do not significantly affect each other's prices, nor non-price product attributes, such as consumer privacy protections or service quality." *Id.* at 8, n.7.

82. Keith Waehrer, *Online Services and the Analysis of Competitive Merger Effects in Privacy Protections and Other Quality Dimensions* 10 (Media Democracy Action Fund, Working Paper, August 21, 2018), http://waehrer.net/Merger%20effects%20in%20privacy%20protections.pdf [https://perma.cc/W4X5-P44V].

83. OECD Quality Report, *supra* note 56, at 6-7. The report also suggests the possible use of hedonic price techniques that are commonly used in econometric studies to adjust prices for quality changes in order to compare the value of products whose quality has improved such as color TVs or automobiles with automatic brakes. They note data difficulties in putting this approach into practice.

84. *See Id.*

85. *See* Sections III and IV, infra.

some circumstances, this can be a cognizable consumer harm that needs to be addressed in merger reviews.

A diminution of privacy competition post-merger could take place a variety of ways. One would be a merger in which a company with weak privacy protections takes over a company with strong privacy protections and reduces these protections after the merger. Some analysts seem to think that this cannot be a problem because a company that provides weak privacy protection does not compete with a company that provides strong privacy protection.[86] They are not in the same market of aiming to satisfy consumer privacy preferences and so a merger cannot result in any consumer harm.[87]

Stucke and Grunes rightly point out that consumers who are dissatisfied with the privacy features of one company rarely go looking for another company with poor privacy protection.[88] If consumer preferences for privacy are important in the market, "privacy is a dimension on which (companies) are competing, whether they offer a lot of protection for the data or a little."[89] Indeed, given the bundled nature of personalization and privacy described earlier, it is hard to see how companies could fail to compete.

As a result, the failure to satisfy consumer privacy preferences post-merger could be a real consumer harm that is properly subject to assessment in merger review, even when one of the companies has no interest in protecting privacy beyond what is legally required. As we will see, this was an important issue in the Facebook/WhatsApp merger.

A fact pattern similar to that in the abuse of dominance case brought by Germany's Federal Cartel Office (FCO) against Facebook might also arise in a merger context.[90] In its case, the FCO observed Facebook's practice of requiring users to accept, as a condition of using Facebook, the collection of information about their use of third-party and affiliated services and the combination of this information with the information about their use of the Facebook service itself.[91] The FCO said that this practice was both a violation of European privacy law and a violation of German competition law.[92]

The FCO said that this practice was a violation of the General Data Protection Directive—specifically, its requirement that Facebook must have a legal basis for the collection and use of personal information.[93] Because Facebook occupies a dominant position in the social media marketplace, the legal basis for data collection cannot be consent because consent has to be voluntary and the lack of genuine alternatives to Facebook means that

---

86. Darren S. Tucker, for instance, argues that a merger will adversely affect privacy choices only "where privacy is an important element of competition and the merger is between two firms that offer stronger privacy protections than most other rivals." Darren S. Tucker, *The Proper Role of Privacy in Merger Review*, 7 *CPI Antitrust Chronicle*, (2015), https://www.competitionpolicyinternational.com/assets/Uploads/TuckerMay-15.pdf.
87. *Id.*
88. *See* STUCKE & GRUNES, *supra* note 5, at 131.
89. *Id.*
90. *See Case Summary: Facebook*, *supra* note 14.
91. *Id.* at 1.
92. *Id.* at 7.
93. *Id.* at 10.

Facebook users cannot give genuine consent to data collection.[94] Moreover, the third-party and affiliate data collection cannot be based on contractual necessity, since the collection of this extra data is not necessary for the provision of Facebook service.[95] Finally, the data collection cannot be based on Facebook's legitimate interests because the extent of the data collection so far exceeded the reasonable expectations of Facebook's users that only marketplace dominance could explain why users accepted it.[96]

In addition, the FCO asserted that the collection and combination of third-party data was a competition problem because the resulting profiles, which can exist only because of Facebook's abuse of its dominant position, gave it an unfair and insuperable advantage in the advertising marketplace.[97] In effect, the FCO asserted that the combined data set does not leave enough data left over for advertising rivals to function effectively.[98]

The FCO proposed what is essentially a data protection remedy. Facebook must allow its users a separate choice in connection with third party and affiliate data collection and combination that would enable them to refuse this collection and combination of data and still be able to use the Facebook social media service.[99] Failing that, it may continue to collect third-party and affiliate data from its users, but it may not combine them together with organic Facebook data to create a single user profile.[100]

This fact pattern can be reimagined as a merger circumstance, in which a social media company seeks to merge to a position of dominance through the acquisition of another social media company with pro-privacy data practices. The merged entity might change the pro-privacy practices of its acquired company, thereby depriving its users of their previous pro-privacy choice. The merged entity's dominance in the social media market prevents these users from moving to a viable alternative, and so the loss of privacy choice is a direct result of the loss of competition.

A merger could harm privacy competition in a different way. If a firm aiming to provide strong privacy protections merges with the only other firm

---

94. *Id.*

95. *Id.* The competition authority conceded that the collection of data from the use of its own service is necessary for the provision of Facebook's service, despite the existence of theoretical alternatives such as user fees or non-targeted advertising support. For this reason, the FCO did not require Facebook to rely on voluntary consent as a legal basis for data collection, which might be vitiated by Facebook's dominant marketplace position. Presumably, it would accept contractual necessity as the legitimate basis for Facebook's collection and use of data on its own service. In any case, it interposed no objections to Facebook requiring, as a condition of using the Facebook service at all, that users accept virtually unlimited data collection about their activities on Facebook's own social media service.

96. *Id.* at 10-11; Düsseldorf Decision, *supra* note 14, at 26 (criticizing the aspect of the FCO decision saying that inattention or indifference might also lead users to accept this level of data collection).

97. *Case Summary: Facebook*, *supra* note 14, at 11.

98. *Id.* at 11. This raises the question why it did not prohibit combining third-party data with Facebook's own data, rather than independent consent to that linkage of data. The harm to competition in the advertising market would seem to arise from the existence of the profiles rather than from the fact of their construction through take-it-or-leave it consent.

99. *Id.* at 12.

100. *Id.*

also aiming to provide strong privacy protections, the merged company might, under certain conditions, be able to reduce privacy protections for its customers without fear of retaliation from other companies.[101] This would provide an interesting case for competition authority to review, but to my knowledge no such case has arisen yet in practice.

A third way privacy competition could be adversely affected by a merger might arise if the acquiring company has a dominant position in a separate market related to the market in which its target competes. The merged entity might then be able to use this dominant position in the related market to advantage its new acquisition against its rivals. When the new acquisition provides less privacy protection than its rivals in the related market, the result might be the foreclosure or marginalization of competitors who provide better privacy protection. This is the fact pattern that arose in the Microsoft/LinkedIn merger review.[102]

H. Consumer Harms Connected to Privacy Are Cognizable in Merger Analysis Only If They Result from a Lessening of Competition

Even if privacy preferences are an important element of competition in the marketplace and even if the merged company would not satisfy them, a review should not necessarily block or condition a proposed transaction. It is not enough to show that a merger leaves some consumer preferences for privacy unsatisfied compared to the market situation before the merger. The privacy loss has to result from the loss of competition.

This is a very general point. Consumer harm counts in merger reviews only if the harm results from a lessening of competition post-merger. Consumer preferences that are no longer satisfied after a merger count as a cognizable merger harm only if the post-merger failure to satisfy them is related to some defect of competition.

The DOJ Merger Guidelines are explicit on this point. They say that a merger "enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers *as a result of diminished competitive constraints or incentives*."[103]

The DOJ Guidelines note that a merged firm might withdraw a product that a significant number of people value.[104] But they add that if there is evidence that this has happened, "the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger."[105] The reason for making this additional attribution inquiry is that:

---

101. Tucker, *supra* note 56, at 5.
102. *See* EU Commission Decision, Microsoft/LinkedIn, *supra* note 7.
103. DOJ 2010 Merger Guidelines, s*upra* note 17, at 2 (emphasis added).
104. *Id.* at 24.
105. *Id.*

> Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.[106]

The DOJ Merger Guidelines consider the circumstance in which two actual or potential competitors merge. When that happens, of course, they no longer compete with each other. Following such a merger, there might be consumer harm such as a price increase or unsatisfied consumer preferences. But the reviewing agency can consider those post-merger consumer harms only when they "result directly from the loss of that competition."[107]

Some examples illustrate the point. Color might be an important dimension of car competition and a merged car company's decision to stop making yellow cars might leave some consumers unsatisfied. But if the merged company's decision is based on a market assessment of demand, or even if it is just based on the whim of the new owners, there is nothing merger review should do to stop this. The merger review might reach a different conclusion if the merger would change competitive conditions so that the merged car company faces substantially lessened competition, which might be the case in a merger to monopoly. Then the company's decision to stop making yellow cars would be predicated on its understanding that in the post-merger world it will not face any competitive response.

To take another example, suppose credit card company American Express seeks acquiring rival Visa and vows that at the end of the transaction Visa will no longer accept transactions for porn merchants. American Express has long had a policy of not accepting the business of porn merchants, because it seeks to preserve what it views as an attractive brand and valuable business image. After the merger, it wants to extend this branding policy to its new acquisition. As a result, some customer preferences will be frustrated after the merger, both on the merchant side and on the cardholder side. Nevertheless, according to DOJ Guidelines, antitrust authorities should be indifferent to this consumer harm as long as there is sufficient competition in the market so that another payment company seeking to gain market share is free to pick up those disgruntled porn merchants as customers. If the loss in consumer satisfaction derives from a newly created dominant position, however, rather than from a branding preference of the acquiring company, then it is cognizable by the merger reviewer, but not otherwise.

The same reasoning applies to a reduction of privacy alternatives after a merger, even when consumers make marketplace choices in large measure on the basis of privacy. It is not enough to show that a merged company might end the pro-privacy practices of an acquired rival by merging. It is also not enough to show that a merged company might be able to defeat a rival that offers its customers more privacy protection. These results have to be the

---

106. *Id.*
107. *Id.* at 3.

consequence of some reduction of competition in the post-merger market. If there would continue to be plenty of rivals in the market, if entry and expansion in the market would remain inexpensive and easy, and if network effects would pose no extraordinary barriers to entry or expansion, then there would be no lessening of competitive conditions after the merger. In the presence of these competitive conditions, especially if privacy is truly an important dimension of competition in that market, a company that did not provide the privacy that many customers want would almost certainly face a strong competitive response. Actual or potential rivals would be able to provide it without facing anticompetitive barriers, and, especially if privacy preferences are strong, they would have every incentive to step forward to provide it.

Swire understands the need to connect any consumer harm in a merger analysis to some failure of competition: "Possible harm to product quality, due to monopoly power, has been clearly recognized in the courts."[108] As a result, even if the "broadening and deepening" of information collection following the Google/DoubleClick merger is accepted as a consumer harm, a reviewing agency has to ask, so what?[109] If the consumer harm—failure to satisfy some consumer preferences, who nevertheless continue to use the product—is not caused by a lack of competition, then the merger review cannot reach it.

In a similar way, Stucke and Grunes understand that a reviewing agency might want to object to a hypothetical Facebook/WhatsApp transaction where it has the effect of eliminating all viable texting choices where privacy is protected.[110] But, as they also point out, this objection can only have force in a merger review where the loss of these choices is "because of entry barriers and network effects" that result in a "lessening of competition."[111] The key is that the elimination of choice derives from failure of competitive conditions due to entry barriers and network effects, not simply from the decision of the merged entity to increase data collection. As we will see later, the European Commission approved the Facebook/WhatsApp merger, even if Facebook would have eliminated WhatsApp's privacy protective business model, because it found plenty of suppliers in the marketplace for communications apps, no substantial entry or switching barriers, and weak network effects.

It is sometimes easy to forget this added burden in merger reviews. Stucke and Grunes raise the possibility of a hypothetical Google/DuckDuckGo merger and say correctly that a key issue in a merger review "would be the degradation in privacy protection post-merger."[112] But they do not focus on the more critical question of whether the loss of DuckDuckGo's privacy protective business model derives solely from a business decision of the new owner or whether it is an exercise of newly-formed market power deriving from the merger itself.

---

108. Swire, *supra* note 4, at 6.
109. *Id.*
110. STUCKE & GRUNES, *supra* note 5, at 265.
111. *Id.*
112. *Id.* at 266.

This need to trace consumer harm to a loss of competition requires a substantial showing, as is revealed by considering what would have to be established to condition or block a Google/DuckDuckGo merger. DuckDuckGo has a one percent market share; its search technology differs from Google's, and it has generated profit every year for the last five years by selling contextual ad services that do not track its users.[113] Even if Google acquired the company and ended its pro-privacy practices, a merger review that follows the DOJ Guidelines would have to show that the resulting lack of competitive conditions would prevent other companies from replicating these elements of a successful business model to meet the frustrated demand of people for whom DuckDuckGo's privacy practices were attractive.[114] With that showing, the merger could possibly be blocked or conditioned, but not without it.

To see how privacy-aware merger reviews work in practice and to derive some lessons for the future, the rest of this Article looks carefully at the European Commission's reviews of the Facebook/WhatsApp merger and the Microsoft/LinkedIn merger. The questions we will be examining in the assessments that follow include whether the merger review considered the differences in privacy practices and, if it did, whether it rejected or conditioned the merger on the basis of these differences. An additional and crucial question is whether the conditions imposed directly or indirectly served to maintain the pro-privacy practices that were at risk in the merger.

III. FACEBOOK/WHATSAPP

In 2014 the European Commission conducted a review of the proposed Facebook merger with the messaging service WhatsApp.[115] Facebook controlled its own competing communications app, Facebook Messenger.[116] The Commission reviewed the possible loss of competition in the social media market,[117] in the communications app market,[118] and in the online advertising market,[119] and approved the merger without conditions.[120]

A key issue in the merger review was one of the possibilities of privacy and antitrust overlap discussed earlier, namely, that the merger would create an excessive concentration of commercially valuable data.[121] Despite its general statement in the decision that privacy issues as such belonged with the data protection authorities, the Commission nonetheless reviewed these

---

113. Nathaniel Popper, *A Feisty Google Adversary Tests How Much People Care About Privacy*, N.Y. TIMES (July 15, 2019), https://www.nytimes.com/2019/07/15/technology/duckduckgo-private-search.html [https://perma.cc/PF6U-TXBB].

114. DOJ 2010 Merger Guidelines, *supra* note 17, at 3.

115. *See* EU Commission Decision, Facebook/WhatsApp, *supra* note 6.

116. *Id.* at par. 4.

117. *Id.* at pars. 143-63.

118. *Id.* at pars. 84-142

119. *Id.* at pars. 164-190.

120. *Id.* at par. 191.

121. *Id.* at par. 164.

data issues.[122] It considered whether the combination of Facebook and WhatsApp user data sets could create a data monopoly.[123] It found that there would be plenty of data left over after the merger for competitors: "[R]egardless of whether the merged entity will start using WhatsApp user data to improve targeted advertising on Facebook's social network, there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook's exclusive control."[124]

In addition, and as a separate matter, the Commission extensively considered the role of privacy as an element of competition. It started by recognizing that: "[C]ontrary to WhatsApp, Facebook Messenger enables Facebook to collect data regarding its users that it uses for the purposes of its advertising activities."[125] It noted that it was a deliberate choice for WhatsApp to build its business "around the goal of knowing as little about [users] as possible."[126] Also, the Commission said that while the importance of privacy and security "varies from user to user . . . [they] are becoming increasingly valued, as shown by the introduction of consumer communications apps specifically addressing privacy and security issues . . . ."[127]

In particular, the Commission observed that besides WhatsApp, two other messaging services, Threema and Telegram, were more protective of privacy than Facebook Messenger.[128] It further noted that privacy concerns "seem to have prompted a high number of German users to switch from WhatsApp to Threema in the 24 hours following the announcement of Facebook's acquisition of WhatsApp."[129] And it also noted that "after the announcement of WhatsApp's acquisition by Facebook and because of privacy concerns, thousands of users downloaded different messaging platforms, in particular Telegram, which offers increased privacy protection."[130] In sum, while not a "maverick" in the marketplace, WhatsApp provided "behavioural ads."[131]

So, the Commission, while not taking privacy as such into account, spent a significant part of its merger review on observing different privacy practices present in the market. Still, the Commission did not conclude that these differences in privacy practices were an important element in the

122. *Id.*

123. *Id.*

124. *Id.* at par. 189.

125. *Id*. at par. 102.

126. EU Commission Decision, Facebook/WhatsApp, *supra* note 6. *See also* par. 169: "WhatsApp does not allow ads because it believes that they would disrupt the experience that it wants to deliver to its users." This rejection of ads is not quite the same as a pro-privacy practice, since non-targeted ads do not rely extensively on user data.

127. *Id.* at par. 87.

128. *Id.* at par. 90, 128 (par. 90 for Threema "increased security of communications" and par. 128 for Telegram).

129. *Id.* at par. 174.

130. EU Commission Decision, Facebook/WhatsApp, *supra* note 6, n. 79.

131. STUCKE & GRUNES, *supra* note 5, at 133. In this way, WhatsApp satisfied the DOJ's "disruptive role" condition of a company able to "disrupt market conditions with a new technology or business model" whose merger with a market incumbent "can involve the loss of actual or potential competition." DOJ 2010 Merger Guidelines, *supra* note 31, at Introduction.

competition between the merging messaging services.[132] It found instead that privacy was just like some of the other relatively minor differences between Facebook and WhatsApp.[133]

These minor differences included the contrasting identifiers used to access the services and the different sources of the contact information used to connect users.[134] Price was a differentiator as well. While most apps were provided for free, Threema charged a subscription fee, as did WhatsApp in some markets.[135]

These contrasting features, including the privacy differences, were real ways in which the services differed, but they were not key factors driving competition in that marketplace, not the main or the paramount basis for consumer choice of communications app.

The Commission concluded instead that, in general: "[T]he main drivers of the competitive interaction between consumer communications apps appear to be (i) the functionalities offered and (ii) the underlying network."[136] It found that the competition between Facebook and WhatsApp also turned on these same two factors: communications functionalities offered and network size.[137] In particular, the size of the network seemed of crucial importance to a typical user since it increases "the number of people he or she can reach."[138]

Moreover, the Commission observed that WhatsApp users did not seem to reject Facebook's privacy practices. The Commission noted: "[B]etween [70-80]% and [80-90]% of WhatsApp users were Facebook users and were therefore already within the reach of Facebook Messenger."[139] If WhatsApp users were genuinely put off by Facebook's privacy practices, so much so that they would prefer to use WhatsApp instead, why were up to 90% of them Facebook users?

Stucke and Grunes wonder why a Facebook user would avoid Facebook Messenger and use WhatsApp instead.[140] Why not just use Facebook Messenger? They speculate that these Facebook users wanted the greater WhatsApp privacy protections.[141] But an alternative possibility is that these users needed WhatsApp to reach the people they wanted to be in touch with who were not Facebook users, and they had no need of the additional people they could reach on Facebook Messenger. So, the Commission concluded

---

132. EU Commission Decision, Facebook/WhatsApp, *supra* note 6, at par. 87.

133. *Id.*

134. *Id.*

135. *Id.* at par. 90.

136. *Id.* at par. 86.

137. *Id.* at par. 103.

138. EU Commission Decision, Facebook/WhatsApp, *supra* note 6, at par. 129. Stucke and Grunes recognize this primacy of network: "In choosing a texting app, the primary consideration, given the network effects, is whether their friends, family, and acquaintances use the app." STUCKE & GRUNES, *supra* note 5, at 131.

139. EU Commission Decision, Facebook/WhatsApp, *supra* note 6, at par. 140.

140. STUCKE & GRUNES, *supra* note 5, at 132.

141. *Id.*

privacy was not a "main" driver of competition in the consumer communications market.[142] It found, moreover, that the merger would not significantly impede effective competition in that communications market.[143]

The proposed transaction would increase the combined company's market share to as much as 40%, with the rest spread among smaller providers.[144] But the Commission also found that, due to substantial overlap of their user base, Facebook Messenger and WhatsApp were more like providers of complementary services than close competitors.[145] So, the merger did not really a diminish existing competition.

It also found that there would be many alternative providers after the merger for users to easily choose,[146] that there were no significant barriers to entry,[147] and that network effects would not seriously hinder competitor expansion or entry,[148] even if Facebook integrated its Messenger service with WhatsApp.[149]

The results of the merger have not been what privacy advocates might have hoped. At the time of the merger, WhatsApp founder Jan Koum said: "Here's what will change for you, our users: nothing."[150] However, in 2016 things began to change. WhatsApp began to share information with Facebook about WhatsApp users, including a user's phone number, last seen data, operating system, mobile country code, mobile carrier code, screen resolution, and device identifier.[151] Two years later, Facebook clarified that WhatsApp would join Facebook, Instagram, and Messenger as an app that advertisers could use to reach their intended audience. These actions triggered the resignation of the WhatsApp founders from Facebook.[152] In May 2019, Facebook announced that the first ads would begin to appear on WhatsApp in 2020.[153]

One result of the merger, then, is that WhatsApp's pro-privacy practices have largely been replaced with the less protective but still legal data collection and use practices typical of the rest of the Facebook product family.

---

142. *Id*. at par. 86.
143. *Id.* at par. 142.
144. EU Commission Decision, Facebook/WhatsApp, *supra* note 6, at par. 96.
145. *Id.* at pars. 101-107.
146. *Id.* at par. 109.
147. *Id.* at par. 117.
148. *Id.* at par. 135.
149. *Id.* at par. 140.
150. WhatsApp Blog, WHATSAPP (Feb. 19, 2014), https://blog.whatsapp.com/499/Facebook? [https://perma.cc/5L48-399R].
151. Natasha Lomas, *WhatsApp to Share User Data With Facebook for Ad Targeting — Here's How to Opt Out*, TECHCRUNCH (Aug. 25, 2016), https://techcrunch.com/2016/08/25/whatsapp-to-share-user-data-with-facebook-for-ad-targeting-heres-how-to-opt-out/ [https://perma.cc/U9UA-R5AX].
152. Deepa Seetharaman, *Facebook's New Message to WhatsApp: Make Money*, WALL ST. J. (Aug. 1, 2018), https://www.wsj.com/articles/facebooks-new-message-to-whatsapp-make-money-1533139325?mod=rss_Technology [https://perma.cc/RY96-A5LD].
153. Anthony Cuthbertson, *Whatsapp: Adverts Coming to Messaging App Next Year, Facebook Reveals*, INDEPENDENT (May 28, 2019), https://www.independent.co.uk/life-style/gadgets-and-tech/news/whatsapp-adverts-update-new-advertising-when-a8933131.html [https://perma.cc/WKN6-ZLV7].

This result might seem to be a step backwards in privacy protection, perhaps attributable to a mistake in the merger review process.

Is it the case, for instance, that the approval was dependent on misleading information that Facebook provided to the Commission during the review? It is true that Facebook faced disciplinary action from the Commission for providing misleading information during the merger review.[154] It was, in fact, able to automatically match users who had both the Facebook app and the WhatsApp app installed on their phones, using the phone's unique code as a common identifier.[155] Facebook, however, had not disclosed this possibility to the Commission during the merger review, even though it had developed such a matching system for Facebook and Instagram, and was working to implement it for WhatsApp after the merger.[156] Facebook admitted that it had negligently provided incorrect or misleading information to the Commission during the merger review.[157] The Commission fined it €110 million.[158]

But the Commission did not change its decision about the legitimacy of the merger even knowing about the ease with which Facebook could merge Facebook and WhatsApp data and it would not have made a different decision if it had been told the truth.[159] It had evaluated the merger based on the assumption that Facebook would be able to merge the data sets after the merger and it still found that the merger did not substantially lessen competition.[160] It said that if Facebook managed to integrate WhatsApp and Facebook data despite apparent technical difficulties, it would "pose a business risk" because "users could switch to competing consumer communications apps."[161] That is, there was still plenty of competition available so that users who wanted to switch to privacy-protective communications apps would be able to do so.[162]

The change in WhatsApp privacy practices after the merger could perhaps be reached by consumer protection law. At the time of the merger, the United States FTC sent a letter to Facebook, saying:

---

154. European Commission, Case No. COMP/M.8228, Facebook/ WhatsApp, 2017 O.J. (C 286). http://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf [https://perma.cc/N7M2-MJ7H].

155. *Id.* at pars. 49-51.

156. *Id.* at par. 86.

157. *Id.* at pars. 41-42.

158. *Id.* at par 108.

159. *Id.* at par 100.

160. *Id.* at pars 27-29.

161. EU Commission Decision, Facebook/WhatsApp, *supra* note 6, at par. 139.

162. *Id.*

> WhatsApp has made a number of promises about the limited nature of the data it collects, maintains, and shares with third parties – promises that exceed the protections currently promised to Facebook users. We want to make clear that, regardless of the acquisition, WhatsApp must continue to honor these promises to consumers. Further, if the acquisition is completed and WhatsApp fails to honor these promises, both companies could be in violation of Section 5 of the Federal Trade Commission (FTC) Act and, potentially, the FTC's order against Facebook.[163]

The FTC has not taken any such consumer protection enforcement actions, but there is clearly a remedy available for companies who mislead the public and their consumers about their data practices. That might be a more productive avenue to pursue to reverse changes in WhatsApp privacy practices post-merger, rather than reopening the merger decision to address privacy issues.

There might have been some mistakes in the European Commission's review of the proposed merger.[164] But the Commission's judgment at the time of the merger that privacy was not a crucial element of competition between Facebook and WhatsApp seems reasonable, even today. At the time of the review, there was no compelling evidence that WhatsApp's pro-privacy practices were a distinguishing feature of communications app competition.[165] Functionality and user base seemed to be the key elements of competition, not privacy.[166] The merger review reasonably avoided blocking or conditioning the merger on the basis of a likely threat to reduce privacy competition.

---

163. *See* Letter from Jessica L. Rich, Bureau of Consumer Protection Director, FTC, to Erin Egan, Chief Privacy Officer, Facebook, and Anne Hoge, General Counsel, WhatsApp Inc. (Apr. 10, 2014), https://www.ftc.gov/public-statements/2014/04/letter-jessica-l-rich-director-federal-trade-commission-bureau-consumer [https://perma.cc/8Y7G-N4Z4]. The FTC has not taken any consumer protection enforcement actions against Facebook for changes in WhatsApp's data practices, including in the recent settlement for violations of the earlier FTC order. *See* Press Release, Fed. Trade Comm'n, FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions [https://perma.cc/UY7L-U4LG].

164. There might be other competition reasons for revisiting the merger such as a dramatic increase in the market share of the combined company that perhaps could reasonably have been foreseen at the time, and the possibility that absent the merger WhatsApp would have emerged as a formidable competitor to Facebook in one or more of the relevant markets. *See also, e.g.*, Mark Glick & Catherine Ruetschlin, *Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook Institute for New Economic Thinking* (Inst. for New Econ. Thinking, Working Paper No. 104) https://www.ineteconomics.org/uploads/papers/WP-104-Glick-and-Reut-Oct-10.pdf [https://perma.cc/LX49-KYDL]. But that is independent of the role of privacy as an element of competition.

165. EU Commission Decision, Facebook/WhatsApp, *supra* note 6, at par 86.

166. *Id.*

IV. MICROSOFT/LINKEDIN

In 2016, the European Commission reviewed the proposed Microsoft/LinkedIn merger.[167] After determining that the merger posed a risk of competitive harm in the market for professional social networks, it accepted Microsoft's commitments in the area of pre-installation and integration with Microsoft's other products and approved the merger with these conditions.[168]

The Commission assessed the possibility of a data monopoly emerging from the sharing of data between Microsoft and LinkedIn.[169] The Commission concluded that there would be no dearth of data for competitors after the merger: "[T]he combination of their respective datasets does not appear to result in raising the barriers to entry/expansion for other players in this space, as there will continue to be a large amount of internet user data that are valuable for advertising purposes . . . not within Microsoft's exclusive control."[170]

Separately and independently, the Commission also assessed the state of privacy competition in the market. Its conclusion on privacy competition in this case was different:

> Privacy related concerns as such do not fall within the scope of EU competition law but can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor. In this instance, the Commission 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.[171]

The Commission determined that Xing, a professional social network competing with LinkedIn in Germany and Austria, "seems to offer a greater degree of privacy protection than LinkedIn."[172] Xing had a separate box to tick to accept its privacy policy, while LinkedIn users automatically accepted its privacy policy when they pressed the "join now" button.[173] Moreover, Xing sought active user consent for new policies and allowed users to continue to use the service regardless of their choice.[174] In contrast, LinkedIn notified users of its privacy policy changes and assumed consent if they continued to

---

167. *See* EU Commission Decision, Microsoft/LinkedIn, *supra* note 7.

168. *Id.* at par. 470.

169. *Id.* at pars. 176-180.

170. *Id.* at par. 180.

171. European Commission, press release of Dec. 6, 2016, Case M.8124, Microsoft/LinkedIn, (Microsoft Press release) https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284 [https://perma.cc/PUJ5-WP34].

172. EU Commission Decision, Microsoft/LinkedIn, *supra* note 7, at par. 350.

173. *Id.*

174. *Id.*

use the service.[175] The Commission found that these differences were important in determining consumer choice: "[P]rivacy is an important parameter of competition and driver of customer choice in the market for (professional social network) services . . . ."[176]

This conclusion on the strength of privacy competition was mentioned in the Commission's determination of a potential competition problem with the merger.[177] The Commission was concerned that Microsoft after the merger could use certain integration and pre-installment practices in connection with its newly acquired LinkedIn app to foreclose competition in the market for professional social networks.[178] This foreclosing of competition would reduce consumer choice for their preferred social network.[179] But it would also prevent consumers from choosing the professional social network that would best protect their privacy. As the Commission put it:

> [T]o the extent that these foreclosure effects would lead to the marginalisation of an existing competitor which offers a greater degree of privacy protection to users than LinkedIn (or make the entry of any such competitor more difficult), the Transaction would also restrict consumer choice in relation to this important parameter of competition when choosing a [professional social network].[180]

To remedy that potential foreclosure problem, the Commission solicited and accepted 5-year commitments from Microsoft restricting their conduct in connection with integrating and pre-installing the LinkedIn app.[181] With these commitments, the Commission cleared the merger.[182]

How did the Commission reach its conclusion on privacy competition? How did it use that conclusion in its final decision and remedy?

The Commission provided an analysis of the market for professional social network services, distinguishing that market from personal social networks such as Facebook, from more specialized professional social networks such as Academia, and from closed social networks such as those limited to a particular enterprise.[183] It identified the other marketplace participants, XING, Viadeo, and GoldenLine,[184] and listed their market shares.[185] The Commission noted the "essential" functionalities that all competing professional social networks must and do have, including: "the creation and update of a CV, searching for jobs, receiving alerts and ads about jobs, and asking to be introduced to new contacts through a common

175. *See id.*
176. *Id.* at n.330.
177. *Id.* at par. 350.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at par. 470.
182. *See id.*
183. *See id.* at par. 115.
184. *Id.* at par. 108.
185. *Id.* at par. 285-286.

connection."[186] But it did not include disclosing its privacy protections as one of these essential functionalities.

It is unclear from the Commission's account what the evidence was for its conclusion that privacy was an "important parameter" in the competition between LinkedIn and Xing, as opposed to just a relatively minor difference between the social networks that did not determine consumer choice.[187] It cited only the "results of the marketplace investigation" and some questions in a survey distributed to social networks.[188]

This lack of detail is disappointing. Moreover, the finding is implausible on its face. Would a person seeking a quality professional social network really base the decision in whole or in substantial part on the basis of the opt-in or opt-out choice structure for data sharing and policy updates described by the Commission? In addition, if privacy was such a major element of competition, why didn't the Commission list a privacy policy as one of the essential functionalities that a professional social network must provide?

To this point, business press accounts of the rivalry between LinkedIn and Xing, its main competitor in German-speaking countries, make no mention of privacy differences, providing some evidence that consumers do not view privacy as a major element of competition.[189] These accounts suggest that a contrast between local and international focus seems to be the key to consumer choice, not privacy.[190] Xing is most compatible with local culture and styles in German-speaking countries, while LinkedIn is more connected with global networks. Privacy does not figure in the rivalry in these accounts at all. If privacy is such a driver of competition in this market, why don't the industry accounts of competition between LinkedIn and Xing in Germany mention it?

As a separate matter, it is hard to interpret the Commission's perplexing assertion that their conclusion on privacy competition in Microsoft/LinkedIn dovetails with their finding in the Facebook/WhatsApp case: "The finding of the importance of privacy as parameter of competition is consistent with the Commission's findings in Facebook/WhatsApp . . . in relation to consumer communication services."[191]

As we saw, the WhatsApp decision clearly says that: "The only factors on the basis of which WhatsApp and Facebook Messenger were considered close competitors . . . are the communications functionalities offered and the

---

186. *Id.* par. 102.
187. *Id.* at n.330.
188. *Id.*
189. *See* Shelley Pascual, *The career-oriented social networking site LinkedIn is growing faster than its main competitor, Xing. What has it been offering professionals to account for this growth?*, THE LOCAL (Feb. 1, 2018), https://www.thelocal.de/20180201/goodbye-xing-the-success-of-linkedin-in-germany [https://perma.cc/8HTB-RZWA];Top Dog Social Media, *LinkedIn vs. Xing: The Battle for DACH*, 2018, https://topdogsocialmedia.com/linkedin-vs-xing/ [https://perma.cc/Y3RP-CMX6].
190. *Id.*
191. EU Commission Decision, Microsoft/LinkedIn, *supra* note 7, at 77 n.330.

size of their respective networks."[192] And the Commission in that case determined that privacy was not a "main" driver of competition.[193]

Moreover, expert commentary two years after the Microsoft/LinkedIn decision from Commission officials who were close to both decisions presents a clear contrast between the conclusions in the two cases:

> For example, in *Facebook/WhatsApp*, in 2014, the Commission found that, while an increasing number of users valued privacy and security, at that time the majority of consumer communications apps (e.g. Facebook Messenger, Skype, WeChat, Line, etc.) did not (*mainly*) compete on privacy features. When reviewing *Microsoft/LinkedIn* in 2016, the Commission found that privacy was an *important* parameter of competition among professional social networks, in particular in certain EU Member States, such as Germany.[194]

So, according to these Commission experts, the Commission found in the Facebook/WhatsApp case that privacy was not a "main" driver of competition and found in the Microsoft/LinkedIn case that privacy was an "important" driver of competition.[195]

The Commission seemed to be going to extraordinary lengths to make their disparate conclusions seem consistent. It is hard to see the motivation for this. It is reasonable, even likely, that privacy will be a more important driver of competition in one market than in another. There is no need to impose an artificial consistency between the two cases.

In any case, the finding of privacy as an important driver of professional social network competition was not a determinant of the Commission's conclusion.[196] It might have added weight to the Commission's reasoning in favor of conditioning the merger before approving it.[197] But the crucial finding was that Microsoft had the incentive and ability to foreclose competition in the professional social network market, regardless of what the drivers of competition in that market actually were.[198] This competition problem derived from Microsoft's control over key business productivity software that allowed it to provide its affiliated LinkedIn app with ease of access and price advantages that competitors would not be able to match.[199] The resulting consumer harm was ultimately the loss of choice of alternative professional social networks, and with it the loss of a privacy alternative that consumers

---

192. EU Commission Decision, Facebook/WhatsApp, *supra* note 6, at par. 103.
193. *Id.* at par. 86.
194. Ocello & Sjödin, *supra* note 51, at 5-6 (emphasis added).
195. *Id.*
196. EU Commission Decision, Microsoft/LinkedIn, *supra* note 7, at pars 306-337, par 338.
197. *Id.* at par. 350.
198. *Id.* at par. 338.
199. *Id.*

valued.[200] The reasoning was from a foreclosing tie to a consumer harm, rather than from the loss of privacy competition to a competition problem.[201]

Moreover, the Commission's remedy did nothing to address LinkedIn's post-merger privacy practices.[202] It did not require the post-merger LinkedIn to make its data practices more pro-privacy or even to preserve the status quo in its data practices by not weakening privacy protections below what they were before the merger.[203] Indeed, the Commission's remedy to avoid certain pre-installation and integration practices would have been exactly the same if the Commission had concluded that privacy was not a parameter of competition at all.

V. Lessons Learned

This review of Commission practice in two high-profile cases reveals the existence of substantial legal and factual obstacles to making progress on privacy through thinking of privacy as an element of competition and using antitrust merger review tools to preserve it. It confirms and illustrates many of the general points made earlier, including the inapplicability of data protection law and the need for factual case-by-case evaluation of privacy preferences. The cases also illustrate some of the formidable empirical difficulties in establishing the existence and strength of privacy preferences. Finally, the cases show that even when agencies examine privacy competition in merger reviews, these considerations do not necessarily play a strong role in the decision itself or in the formulation of the conditions designed to remedy competitive harm.

In both cases, the European Commission explicitly asserted that it did not apply data protection law in its merger reviews and that privacy as such belonged with data protection law, not with antirust merger reviews. Without explicitly stating so, it presumed that different privacy practices it observed in the marketplace all complied with data protection law. It did not seek out violations of data protection law and did not seek to remedy any perceived data protection violations through conditions on the mergers. It did not presume that robust privacy protective practices it observed from some companies in the marketplace were better, or more worthy or of higher quality than the less protective practices of others.

This respect for the differing privacy practices was particularly evident in the Commission's avoidance of the language of product quality.[204] It did not describe privacy as an aspect of product quality, but as a parameter of competition, and focused on the extent to which consumers made their

200. *Id.*
201. *Id.* at par. 350 and 338.
202. *Id.* at par. 437-438.
203. *Id.*
204. The one reference to privacy as an aspect of quality in the two cases comes from Microsoft's press release where privacy is described as relevant only "to the extent that consumers see it as a significant factor of quality." *See* Microsoft Press Release, *supra* note 171. This is in contrast to viewing privacy as if it were a matter of an objectively superior product feature such as safety or higher power of a car engine.

choices in the marketplace on the basis of the differences in data practices of the competing companies. It acknowledged that consumer privacy preferences varied in the marketplace, that some consumers valued it highly and others did not.

In short, it validated the conception of privacy as subjective. It was guided by its assessment of the value people placed on the pro-privacy data practices of WhatsApp or Xing, not by its own evaluation of the objective quality of these data practices. It sought to determine whether the privacy practices involved were a key determinant of market demand for the product.

In neither case did the Commission simply assert or deny that privacy was a key element of competition in markets involving the merging entities, that is, that privacy preferences were strong determinants of consumer behavior in the marketplace. This is an important distinction between asserting the possibility that privacy is a key element of competition and a finding that it is or is not a key determinant of consumer decisions.[205]

Instead, the Commission based its conclusions on investigations of the specific markets relevant to each merger review, and it reached different factual conclusions in each case. The analysis in the Facebook/WhatsApp case was fuller and more detailed, assessing the differences among the key marketplace participants and dividing them into those that were important drivers of competition and those with weaker impact. The assessment in the Microsoft/LinkedIn case was closer to mere assertion, with only a vague reference to an underlying market investigation and no assessment of other factors driving competition in the professional social media market.

Neither case was challenged by the parties involved, so we do not have a good idea of what level of evidence would be required by a reviewing court to sustain a challenge to an agency finding concerning privacy competition. However, the paucity of evidence in the Microsoft/LinkedIn case, its surface implausibility, and its lack of fit with external business assessments of marketplace drivers suggest that the level of empirical support in the Microsoft/LinkedIn case would not have been sufficient to sustain a finding of privacy as a key parameter of competition in the face of a determined challenge.

The two cases reveal the underlying empirical weakness in assessing the importance of privacy as an element of competition in merger review cases. These two merger analyses produced qualitative, hard-to-assess judgments on privacy competition that are open to speculative challenges. For instance, Stucke and Grunes speculate that privacy was an important element in the choice by Facebook users to use WhatsApp instead of Facebook Messenger.[206] That might be true. Perhaps they were worried about the extra privacy intrusion involved in one company knowing not only your social media interactions but also your messenger interactions. Or maybe they just

---

205. "The Commission did evoke privacy, noting that it *can* constitute an important dimension of competition between Facebook and WhatsApp, but concluding that they *did not* compete on this basis (i.e., privacy *was not* an important factor in the decision to use these applications)." Orla Lynsky, *Grappling with "Data Power": Normative Nudges from Data Protection and Privacy*, 20 THEORETICAL INQUIRIES L. 189, 216 (2019) (emphasis added).

206. *See* STUCKE & GRUNES, *supra* note 5, at 132.

needed the network of friends and contacts that WhatsApp had and Facebook did not. But how, other than mindreading, introspection, intuition, or speculation, can a reviewing agency make these determinations?

Also illustrating the slipperiness of the assessments involved is the Commission's attempt to show consistency between the two merger decisions despite the finding in the one case that privacy was an important parameter of competition and the finding in the other case that it was not. It raises the question of the role of external policy factors in determining the outcome of these assessments.

This lack of clarity and consistency might be thought to illustrate the inherent instability in trying to treat an intangible factor such as privacy as a non-price dimension of competition. But privacy practices are observable phenomena. It is a reasonably objective matter whether a company collects data for targeted advertising purposes or provides an opt-in choice for data collection or use.

The problem is not the intangibility of assessing a company's privacy practices. Rather, it is the difficulty of objectively assessing which factors play a crucial role in consumer purchasing decisions. To the extent that competition authorities are going to rely on assessing the relative importance of different dimensions of competition in merger reviews, they will need to develop more sophisticated empirical tools to guide their marketplace investigations. How to transform these qualitative and shifting judgments into something more empirical is a major challenge for the idea that competition policy can usefully advance privacy goals in merger reviews.

In the absence of firmer standards of evidence, the role of privacy in merger assessment might vary with shifting external policy priorities. It is worth noting that Microsoft/LinkedIn was reviewed in 2016 and Facebook/WhatsApp in 2014. During the two-year interval, the importance of privacy in European public policy discussions vastly increased, as European policymakers made the final push to pass the General Data Protection Regulation.[207] Final passage took place in April 2016, very close in time to the Commission's merger review of Microsoft/LinkedIn.[208] Merger review officials are not immune to these changes in policy emphasis and that might have given them a greater incentive in 2016 to focus on privacy as a dimension of competition than they did in 2014.

A final lesson from these two cases is that even when merger reviewing authorities take privacy competition into account, it might not be a major driver of the decision result or of any conditions devised. If the reviewing authority finds that there is little or no privacy competition in the markets under assessment in a merger review, privacy competition can play no further role in the review, even if there might be other reasons to block or condition the proposed merger.

---

207. Press Release, European Parliament, *Data protection reform - Parliament approves new rules fit for the digital era* (Apr. 14, 2016), https://www.europarl.europa.eu/news/en/press-room/20160407IPR21776/data-protection-reform-parliament-approves-new-rules-fit-for-the-digital-era. [https://perma.cc/9ZNX-W32L].

208. *Id.*

The Facebook/WhatsApp merger review illustrates how privacy competition can become irrelevant to antitrust decision making in a case. The Commission observed the difference between the privacy practices of WhatsApp and Facebook Messenger but found that consumers largely did not make their choice of communications apps on that basis. The merger assessment then proceeded to analyze whether the merger would substantially lessen competition in each of three markets—communications apps, social networking, and online advertising—without further addressing the effect on the relatively minor privacy competition.

But the irrelevance of privacy competition to the Commission's ultimate decision is more pronounced than that. The Commission's approval of the merger without conditions would not have been different if the Commission *had* found that privacy was a key parameter of competition between Facebook Messenger and WhatsApp. The reason is that even if privacy had been important, the presence of other competitors providing large and reliable networks and/or pro-privacy data practices, the lack of entry and switching barriers, and the limited role of network effects all meant that competition in privacy would have been preserved in the post-merger world.

In the Microsoft/LinkedIn case, the Commission reached the opposite conclusion—that privacy competition was strong in the market for professional social networks. But here too, the finding was essentially irrelevant to the determination that conditions were needed to sustain competition in the market and to the crafting of appropriate conditions.

The Commission's concern in Microsoft/LinkedIn had nothing to do with privacy competition. Its concern was the dominant position that Microsoft had in the marketplace for productivity software and the likelihood that, unchecked, it would use this position to pre-install and integrate its newly acquired professional software app, LinkedIn, in a way that gave it an insuperable advantage over rival professional social networks. The previous vibrant competition between LinkedIn and other professional social networks, in particular Xing, would be substantially diminished. The presence or absence of privacy competition was beside the point in this assessment.

Moreover, in devising the remedy, the Commission did not consider any special measures to preserve privacy protection. Various commitments voluntarily limiting Microsoft's option for pre-installation and integration were sufficient to warrant Commission approval of the merger. The remedy it imposed was unrelated to the merged entity's privacy practices.

VI. CONCLUSION

Carl Shapiro makes the fundamental point that more competition might very well be the enemy of privacy, not its friend: "Indeed, it is not even clear that more competition would provide consumers with greater privacy, or better combat information disorder: unregulated, competition might instead trigger a race to the bottom, and many smaller firms might be harder to

regulate than a few large ones."[209] More competition might impel companies to outdo their rivals through ever more intensive exploitation of their consumers' information. In this view of things, privacy law is needed to counteract the harmful tendency of competition to undermine privacy, and the last thing we need to improve privacy is more competition!

But suppose Shapiro is wrong, and instead suppose that competition has driven or is likely to drive companies to provide more privacy than is required by law. Imagine that consumer demand for pro-privacy data practices is strong and some companies seek, or are on the cusp of seeking, to distinguish themselves from their rivals by aiming to satisfy these preferences. In other words, assume that there is strong privacy competition, that is, competition for consumer business based on their privacy preferences. Can merger reviews under competition law realistically preserve this privacy competition?

In principle the answer is yes. If some companies responding to strong consumer demand provide or are likely to provide more privacy protection than required by current law, competition policy authorities might be able to preserve that competition-driven privacy by blocking or conditioning a merger that would threaten their continued ability to provide that extra level of privacy protection.

However, to achieve this modest result for privacy protection, antitrust authorities must overcome high legal and factual obstacles. They need to show not only that some companies are providing or are likely to provide additional levels of privacy protection, but that a significant number of consumers make their choice to patronize these companies largely on the basis of privacy protection. This in fact is the practical meaning of the oft-repeated phrase that privacy can be a key parameter of competition in the marketplace.

But this feature of marketplace competition cannot be simply assumed. Merger authorities must demonstrate the existence of privacy competition through a fact-based market investigation, where, as we have seen from the two cases examined in this Article, the standards of evidence are unclear.

Then the reviewing authority must show that this provision of additional privacy protection is not likely to endure in the post-merger world. This could happen in a variety of ways, but the reviewing authority must establish an incentive for the merged entity to reduce the level of privacy protection below that which would have been provided in the absence of the merger. This loss of privacy protection would then be a consumer harm that could be considered in assessing the merger.

Finally, and most crucially, this consumer harm must be likely to arise because of some reduction in competitive conditions in the post-merger world. It is not enough to show that the post-merger world would be one with

---

209. Shapiro, *supra* note 31, at 79. This notion that competition might lead to a decline in an aspect of product quality like privacy is related to the ambiguous relationship between competition and product quality. Both theory and empirical research show that "changes in competition levels can have either positive or negative effects on quality." OECD Quality Report, *supra* note 56, at 7.

lower privacy protections. If the reduction in privacy protection is due to a business reassessment of consumer demand or even to the whims of the new owners, it is not determinative under merger review standards, even though it is a real loss for consumers.

The consumer harm connected to a privacy loss must be traceable to a substantial lessening of competitive forces. If there would be plenty of rivals, if entry and expansion would be easy, if network effects would pose no fundamental obstacles to entry or expansion, then, especially if privacy demand is strong in the marketplace, it is hard to see why the loss of valued privacy protections would not be quickly remedied in this fully competitive marketplace. In the presence of strong consumer demand for privacy, the merged company might have an incentive to reduce privacy protection, but vibrant marketplace competition either will block them from doing so successfully or will impel existing rivals or new entrants to fill their shoes.

Finally, it is not clear how central considerations of privacy competition would be even in these cases. All the real work in merger review might be accomplished outside a consideration of privacy preferences in assessing whether an unconditioned merger will lead to a significant loss in competitive conditions and whether there are measures short of disallowance that will maintain competition. Considerations of competition in privacy might very well add weight to these considerations in that any loss of competitive conditions will also reduce privacy competition and any steps to maintain competition will also maintain privacy competition. But privacy will not be determinative of the outcome.

It should not be a surprise that such formidable legal and factual obstacles loom in front of any attempt to use privacy competition as a key element in seeking to block or condition mergers. High hurdles are present in all attempts to block or condition mergers. Under existing competition law and jurisprudence, it is hard, and it is supposed to be hard, to do this. If that is true in general, it is not less true when privacy is a major factor in marketplace competition.

Taken together, the state of the competition law and numerous practical considerations in assessing privacy competition cast a shadow over the efficacy of merger reviews as a significant legal mechanism for maintenance of privacy protections. In this Article, I have described the considerations involved in deploying merger control resources against the increased collection and use of personal information by digital platforms and other firms. The results strongly suggest that it would be better to turn to other aspects of competition law or to privacy law itself to vindicate privacy rights.[210]

---

210. As mentioned earlier in the paper, other ways of addressing privacy issues through the application of competition law exist, namely, through treating personal data as an asset that might be monopolized in a merger and imposing privacy-preserving conditions on dominant companies. Future work will assess the barriers and obstacles to taking these avenues through competition law toward the protection of privacy.