



EUROPEAN COMMISSION  
DG Competition

## ***CASE M.8228 - FACEBOOK / WHATSAPP***

(Only the English text is authentic)

### **MERGER PROCEDURE REGULATION (EC) 139/2004**

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Article 14(1) Regulation (EC) 139/2004

Date: 17.05.2017

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Brussels, 17.5.2017  
C(2017) 3192 final

*PUBLIC VERSION*

**COMMISSION DECISION**

**of 17.5.2017**

**imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the  
supply by an undertaking of incorrect or misleading information  
(Case No. M.8228 – FACEBOOK / WHATSAPP)**

(Only the English version is authentic)

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# COMMISSION DECISION

of 17.5.2017

## imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 – FACEBOOK / WHATSAPP)

(Only the English version is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>1</sup>, and in particular Article 14(1) thereof,

Having given Facebook, Inc. and Facebook Ireland Limited the opportunity in accordance with Article 18 of Regulation (EC) No 139/2004 to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations<sup>2</sup>,

Having regard to the final report of the Hearing Officer in this case<sup>3</sup>,

Whereas:

### 1. INTRODUCTION

#### 1.1. The undertakings concerned and the concentration

- (1) Facebook, Inc. is a provider of websites and applications for mobile devices ("**apps**") offering social networking, consumer communications and photo and video-sharing functionalities. Facebook, Inc. also provides online advertising space. In particular, it offers the social networking platform "Facebook" ("**FB**"), the consumer communications app "Facebook Messenger" ("**FBM**") and the photo and video-sharing platform "Instagram" ("**IG**"). In the EEA, Facebook, Inc. operates via its wholly-owned subsidiary, Facebook Ireland Limited (Facebook, Inc. and Facebook Ireland Limited are collectively hereinafter referred to as "**Facebook**").
- (2) WhatsApp Inc. is a provider of consumer communications services via the mobile app "WhatsApp" ("**WA**"). It does not sell either advertising space or the user data which it collects.
- (3) WhatsApp Inc. has been a subsidiary of Facebook, Inc. since 6 October 2014. The acquisition of control within the meaning of Article 3(1)(b) of the Regulation (EC)

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1. With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

<sup>2</sup> OJ C .....200. , p....

<sup>3</sup> OJ C .....200. , p....

No 139/2004 ("**the Merger Regulation**") of the whole of the undertaking of WhatsApp Inc. by Facebook was reviewed by the Commission under Case No. M.7217 – *Facebook/WhatsApp*. The acquisition is hereinafter referred to as "**the Transaction**."<sup>4</sup>

## 1.2. The merger review proceedings

- (4) On 19 February 2014, Facebook, Inc. and WhatsApp Inc. ("**the Parties**") signed an agreement entitled "*the Agreement and Plan of Merger and Reorganization*" pursuant to which WhatsApp Inc. would successively merge with and into wholly-owned subsidiaries of Facebook, Inc. and thereby be acquired by Facebook, Inc.
- (5) On 29 May 2014, Facebook, Inc. ("**the Notifying Party**") submitted a first draft of the notification form in Case No. M.7217 – *Facebook/WhatsApp* to the Commission.
- (6) On 6 June 2014, the Commission sent its questions on this first draft to the Notifying Party. The Notifying Party submitted a reply on 18 June 2014.
- (7) On 25 June 2014, by way of follow-up to that reply, the Commission sent the Notifying Party a second set of pre-notification questions.
- (8) The reply to this second set of questions was not submitted as a self-standing document, but rather it was incorporated into the second draft of the notification form submitted to the Commission by the Notifying Party on 1 July 2014.
- (9) On 7 August 2014, the Commission sent further follow-up questions to the Parties. These questions covered a broad range of topics, including potential relevant market definitions, market share metrics and internal documents of the Parties. They also included questions on possible cross-platform communication between WA and FBM.<sup>5</sup>
- (10) On 20 August 2014, the Notifying Party submitted a reply to this third set of questions and, in parallel, submitted a third draft of the notification form incorporating its latest replies.
- (11) On 25 August 2014, the Commission followed up with further questions to the Parties. In these questions, the Commission requested further clarification on the possibility of cross-platform communication between FB and WA as well as on the possible linking or matching of customer profiles on WA with those customer profiles on FB.<sup>6</sup> No stand-alone reply to these questions was provided; instead, they were addressed directly in the final notified Form CO.<sup>7</sup>

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<sup>4</sup> The concentration arising from the Transaction did not have a Union dimension within the meaning of Article 1(2) or (3) of the Merger Regulation but it was referred to the Commission pursuant to Article 4(5) of that Regulation. On 19 May 2014, the Notifying Party informed the Commission by means of a reasoned submission that the concentration arising from the Transaction should be examined by the Commission pursuant to Article 4(5) of the Merger Regulation. The concentration arising from the Transaction fulfilled the conditions set out in that Article as it was capable of being reviewed under the national competition laws of [...]. Since none of the Member States competent to examine the concentration expressed its disagreement as regards the request to refer the case, the concentration was deemed to have a Union dimension by virtue of Article 4(5) of the Merger Regulation.

<sup>5</sup> See Section 2.2.1.1.

<sup>6</sup> See Section 2.2.1.1.

<sup>7</sup> Four more exchanges took place between the Commission and the Parties during the pre-notification phase: (i) on 8 July 2014, a list of preliminary issues identified by the Commission in the course of its pre-notification contacts with third parties was provided to the Notifying Party to allow it to present its

- (12) On 29 August 2014, the Notifying Party formally notified the concentration to the Commission by formally submitting a final version of notification form ("**the final Form CO**") pursuant to Article 4 of the Merger Regulation, and following referral of the case to the Commission pursuant to Article 4(5) of that Regulation.<sup>8</sup> The notification of the final Form CO opened "**the Phase I investigation**".
- (13) On 18 September 2014, in the course of the Commission's Phase I investigation, the Commission sent the Parties a request for information (an "**RFI**") pursuant to Article 11(2) of the Merger Regulation ("**the RFI of 18 September 2014**") seeking their comments on a submission made by a third-party complainant regarding options for technical integration between FB and WA (the "**Third Party Paper**").<sup>9</sup> The Parties submitted a reply to this RFI on 23 September 2014 ("**the Reply of 23 September 2014**").
- (14) On 3 October 2014, the Commission adopted a decision pursuant to Article 6(1)(b) of the Merger Regulation ("**the Article 6(1)(b) Decision**") declaring the Transaction compatible with the internal market and with the Agreement on the European Economic Area.
- (15) The proceedings during the period between submission of the first draft of the notification form on 29 May 2014 and adoption of the Article 6(1)(b) Decision on 3 October 2014 is referred to hereinafter as "**the Merger Review Proceedings**".
- (16) On 17 October 2014, Facebook, Inc. sent an email to the Commission pointing out three paragraphs in the Article 6(1)(b) Decision which, in Facebook, Inc.'s view, contained statements that were not entirely accurate.<sup>10</sup> On 13 November 2014, on the basis of that email, the Commission adopted a decision correcting certain errors in the Article 6(1)(b) Decision.

### 1.3. The Commission's assessment in the Article 6(1)(b) Decision

- (17) The assessment of the effects of the Transaction set out in the Article 6(1)(b) Decision focused on the markets for (i) consumer communications services, (ii) social networking services, and (iii) online advertising services. As part of its

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view on these issues (the Notifying Party did not submit a stand-alone reply to this list of issues but addressed them directly in the third draft notification form submitted by it); (ii) on 22 August 2014, the Commission sent preliminary questions on the third draft notification form (the Notifying Party did not submit a stand-alone reply to these questions but addressed them directly in the final Form CO); (iii) on 26 August 2014, the Commission requested the Parties to provide a full list with all functionalities offered by FB, FBM and WA (including foreseen future functionalities) to which the Parties replied on 27 August 2014; and (iv) on 28 August 2014, the Notifying Party sent the Commission drafts of the text on the market definitions for social networking services and online advertising services, and related annexes, which it intended to include in its final notification form of the concentration.

<sup>8</sup> See footnote 4.

<sup>9</sup> A number of other RFIs were sent by the Commission to the Notifying Party during the investigation of Case No. M.7217 – *Facebook/WhatsApp*. These were: the RFI of 1 September 2014 (to which the Notifying Party submitted a reply on 3 September 2014), the RFI of 12 September 2014 (to which the Notifying Party submitted a reply on 17 September 2014), the RFI of 13 September 2014 (to which the Notifying Party submitted replies on 15 and 17 September 2014), the further RFI of 18 September 2014 on advertising issues (to which the Notifying Party submitted a reply on 19 September 2014), the RFI of 25 September 2014 (to which the Notifying Party submitted a reply on 29 September 2014) and the RFI of 30 September 2014 (to which the Notifying Party submitted a reply on 1 October 2014).

<sup>10</sup> Email from Facebook's legal representative to the Commission sent on 17 October 2014 at 11.08 a.m. CET, " RE: M.7217 - FACEBOOK / WHATSAPP: Advance information copy of decision".

assessment, the Commission also analysed third-party complaints about possible forms of integration between the functionalities of FB and WA.

#### *1.3.1. Consumer communications services*

- (18) The Commission assessed the impact of the Transaction on a relevant product market encompassing consumer communications apps on smartphones offered for all operating systems ("OS") and including all communication functionalities. The Commission considered the geographic scope of this product market to be at least EEA-wide, if not worldwide.
- (19) The Commission found that FBM and WA were not close competitors with respect to consumer communications services due to a number of differences between them, notably in the following areas: (i) the identifiers ("ID") used to access the services (phone number for WA and FB ID for FBM); (ii) the source of the contacts (the user's handset address book for WA and all FB users for FBM); (iii) the user experience (richer in FBM); and (iv) the intensity of usage of each app (significantly more messages per active user exchanged via WA than via FBM).
- (20) Although consumer communications apps are characterised by network effects<sup>11</sup>, the Commission considered that, post-Transaction, such network effects would be unlikely, on balance, to shield the merged entity from competition from new and existing consumer communications apps, due to the existence of certain mitigating factors.

#### *1.3.2. Social networking services*

- (21) As for social networking services<sup>12</sup>, the Commission found that, while consumer communications apps like FBM and WA offered certain elements that were typical of social networking services, in particular sharing of messages and photos, there were important differences between WA and social networking services. For example, social networks tended to offer a richer social experience and a larger number of functionalities. The Commission ultimately left open the precise delineation of the market for social networking services. It concluded that the geographic scope for the market was at least EEA-wide, if not worldwide.
- (22) The Commission found no indication of any plans by WhatsApp Inc. to become a potential competitor in social networking services. Nevertheless, the Commission assessed the likely competitive effects of the Transaction under a broader definition of the potential market for social networking services, assuming that both the Parties were already actual competitors in that market.
- (23) Based on the considerable differences between the functionalities and focus of each of the Parties, the Commission concluded that they were not close competitors in that potential market.

#### *1.3.3. Online advertising services*

- (24) The Commission carried out its assessment of the Transaction on the market for online advertising services leaving open the question of whether a further

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<sup>11</sup> Network effects arise when the value of a product or service to its users increases with the number of other users of that product or service.

<sup>12</sup> Social networking services can be described as services which enable users to connect, share, communicate and express themselves online or through a mobile app.

segmentation of the product market between search and non-search online advertising was appropriate. It considered the geographic scope of the market to be national or alongside linguistic borders within the EEA.

- (25) The Commission noted that the Transaction would not give rise to any horizontal overlaps in the market for online advertising or any sub-segment of that market as WhatsApp Inc. was not active in that market.<sup>13</sup> It also noted that the Transaction would not increase the amount of user data potentially available to Facebook for advertising purposes as WA did not collect any such data at that time that were valuable for advertising purposes.
- (26) Nonetheless, the Commission examined whether the Transaction could strengthen Facebook's position in online advertising and hamper competition by Facebook either (i) introducing advertising on WA, or (ii) using WA as a potential source of user data for improving the targeting of Facebook's advertising services outside WA (or doing both those things).
- (27) The Commission concluded that, regardless of whether Facebook would introduce advertising on WA, there would continue to be a sufficient number of actual or potential competitors equally as well-placed as Facebook to offer targeted advertising. It also concluded that, regardless of whether Facebook would start using WA user data to improve targeted advertising on Facebook's social network, there would continue to be a large amount of internet user data that were valuable for advertising purposes and that were not within Facebook's exclusive control. It therefore concluded that the Transaction would not give rise to serious doubts as to its compatibility with the internal market as regards the market for the provision of online advertising services, including any potential sub-segments of it.

#### *1.3.4. The third-party complaints about integration between FB and WA*

- (28) During the market investigation, several third parties (including the one that submitted the Third Party Paper) suggested that, following the Transaction, some form of integration of WA with FB (including FBM) was likely. Examples of such forms of integration given by third parties included cross-platform communication between WA and FB, enabling WA and FB users to communicate with each other or enabling FB posts or status updates to be delivered to WA, posting to FB from WA, or merging both services into one single platform. Such integration could also allow Facebook to have access to WA data. In the view of these third parties, integration of WA and FB could therefore strengthen the Parties' position in the markets for consumer communications apps, social networking services and online advertising services.
- (29) On this issue, the Commission considered that technical integration between WA and FB was unlikely to be as straightforward from a technical perspective as presented by third parties. This assessment was based on submissions by the Notifying Party highlighting, for example, the difficulty of matching WA users' profiles automatically and reliably with those users' profiles on FB (and *vice versa*). Moreover, the Commission concluded that, even if some integration of WA with FB were to take place post-Transaction, its competitive impact would be mitigated by the fact that there was already a significant overlap between their respective

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<sup>13</sup> WhatsApp Inc. did not sell any form of advertising and does not do so today.



members. With respect to online advertising services, the Commission's reasons for excluding concerns with respect to that market are presented in recital (27).

#### **1.4. The current proceedings**

- (30) On 30 June 2016, Facebook, Inc. submitted a briefing paper to the Commission entitled "*WhatsApp Terms of Service and Privacy Policy Update*" ("**the First Briefing Paper**"). In that paper it referred to certain planned "*product improvements*" which would rely on "*a form of user matching between Facebook and WhatsApp that was not widely available in 2014*".
- (31) On 28 July 2016, the Commission sent the Parties an RFI made by decision adopted pursuant to Article 11(3) of the Merger Regulation ("**the RFI No. 1**") asking for clarifications on the First Briefing Paper, in particular on the consistency between certain statements contained in that Paper and information supplied in the final Form CO and the Reply of 23 September 2014, and requesting certain internal documents of the Parties. More specifically, the Commission asked for information to assess whether "*the form of user matching between Facebook and WhatsApp*" described in the First Briefing Paper, on which Facebook's planned product improvements would rely, had already been available and known to the Parties at the time of the Commission's review of the Transaction and adoption of the Article 6(1)(b) Decision.
- (32) On 3 August 2016, Facebook submitted a reply to RFI No. 1 together with a briefing paper entitled "*Planned Update to WhatsApp's Terms of Service and Privacy Policy Does Not Affect the Commission's Clearance Decision*" ("**the Second Briefing Paper**"). On 8 and 12 August 2016, it supplemented its reply by submitting the internal documents requested in RFI No. 1.
- (33) On 11 August 2016, the Commission sent Facebook a follow-up RFI by request made pursuant to Article 11(2) of the Merger Regulation ("**the RFI No. 2**"). Facebook replied to that RFI on 16 August 2016.
- (34) On 7 September 2016, Facebook submitted to the Commission a note entitled "*WhatsApp's Update of its Terms of Service and Privacy Policy*" summarising its previous submissions and its views on the potential infringement by it ("**the Third Briefing Paper**").
- (35) On 29 September 2016, the Commission informed the Parties by letter of the ongoing investigation concerning possible infringements of the obligation not to supply incorrect or misleading information and of the fact that these might ultimately lead to fines being imposed pursuant to Article 14(1) of the Merger Regulation.
- (36) On 3 October 2016, the Commission sent the Parties a further RFI by request made pursuant to Article 11(2) of the Merger Regulation. This RFI concerned in particular information to enable the Commission to assess the possible impact of the potentially incorrect or misleading information supplied by the Parties on the competition analysis set out in the Article 6(1)(b) Decision ("**the RFI No. 3**"). The Parties responded to this request in part on 19 October 2016 and completed their response on 24 October 2016.
- (37) On 15 December 2016, a state-of-play meeting was held between the Commission and Facebook. At that meeting, the Commission informed Facebook of the preliminary results of its investigation into possible infringements of the obligation

not to supply incorrect or misleading information as described in Article 14(1)(a) and (b) of the Merger Regulation.

- (38) On 20 December 2016, the Commission issued a statement of objections ("**the Statement of Objections**") pursuant to Article 18 of the Merger Regulation addressed to Facebook. In the Statement of Objections, the Commission stated that it had come to the preliminary view, with respect to the possibility of matching FB IDs automatically with WA users' mobile phone numbers, that:
- (i) Facebook, Inc. had intentionally or at least negligently supplied incorrect or misleading information in the final Form CO in the context of Case No. M.7217 – *Facebook/WhatsApp*;
  - (ii) Facebook, Inc. had intentionally or at least negligently supplied incorrect or misleading information in the Reply of 23 September 2014 provided in response to the RFI of 18 September 2014 made pursuant to Article 11(2) of the Merger Regulation in the context of Case No. M.7217 – *Facebook/WhatsApp*;
  - (iii) fines should be imposed on Facebook, Inc. in accordance with Article 14(1)(a) and Article 14(1)(b) of the Merger Regulation.
- (39) In its letter accompanying the Statement of Objections, the Commission offered Facebook the opportunity of submitting observations on the objections raised in the Statement of Objections, in accordance with Article 18 of the Merger Regulation and Articles 13 and 14 of Commission Regulation (EC) No 802/2004<sup>14</sup> ("**the Implementing Regulation**"), both in writing and at an oral hearing. In order to assist Facebook in the preparation of its observations, the letter also offered Facebook the opportunity of consulting non-confidential versions of the documents in the Commission's file in accordance with Article 18 of the Merger Regulation and Article 17 of the Implementing Regulation ("**access to the file**").
- (40) On 13 January 2017, Facebook asked for an extension of the deadline to respond to the Statement of Objections until 17 February 2017, which the Commission granted on the same day. Subsequently, at Facebook's request, the deadline was further extended until 15 March 2017.
- (41) On 14 March 2017, Facebook submitted its response to the Statement of Objections ("**the SO Response**"). In the SO Response, Facebook:
- (i) acknowledged the essence of the facts contained in the Statement of Objections as well as that the information it provided to the Commission was incorrect and misleading within the meaning of Article 4(1) of the Implementing Regulation and Article 14(1) of the Merger Regulation and that its conduct was negligent within the meaning of Article 14(1) of the Merger Regulation;
  - (ii) confirmed that it did not envisage requesting access to the file or an oral hearing;
  - (iii) did not dispute that the information concerning the possibility of matching FB IDs automatically with WA users' mobile phone numbers that was supplied by

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<sup>14</sup>

Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.04.2004, p. 1-39).

Facebook in the final Form CO and in the Reply of 23 September 2014 was relevant for the Commission's assessment of the Transaction; and

- (iv) agreed to receive this Decision in English.
- (42) Facebook submitted these comments in the context of a cooperation process and contingent upon the fine not exceeding a certain limit, as well as subject to the following conditions:
- (i) Facebook's conduct being qualified as negligent or at least negligent;<sup>15</sup> and
  - (ii) The Commission stating that the information supplied by Facebook did not have any impact on the ultimate outcome of the competitive assessment of the Transaction undertaken in the Article 6(1)(b) Decision.<sup>16</sup>
- (43) The Advisory Committee discussed the draft of this Decision on 27 April 2017 and on 11 May 2017 and issued a favourable opinion.<sup>17</sup>
- (44) The proceedings during the period between the First Briefing Paper and adoption of this Decision is referred to hereinafter as "**the Current Proceedings**".

### **1.5. The update to WA's Terms of Service and Privacy Policy**

- (45) In the First Briefing Paper, Facebook, Inc. explained that WhatsApp Inc. planned to launch an update on or around 28 July 2016 to WA's Terms of Service and Privacy Policy ("**the Update**"). The Update was eventually released on 25 August 2016 and was the first update of WA's privacy policy since completion of the Transaction.
- (46) The Update aimed to (i) reflect certain new features of WA, including end-to-end encryption of message content, "WhatsApp Calling" and "WhatsApp Web"; (ii) introduce commercial messaging between businesses and users, allowing businesses to send promotional messages to their customers via WA; and (iii) enable Facebook, Inc., and subsidiaries of Facebook, Inc., to gain access to and use certain WA users' data, subject to a user control.<sup>18</sup>
- (47) The data items that WA, subject to user consent, would share with Facebook after the Update would be the following: [...].<sup>19</sup>
- (48) In the First Briefing Paper, Facebook, Inc. explained that some of the uses it contemplated for the data shared by WhatsApp, Inc. were:
- (i) [...];

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<sup>15</sup> See Section 2.2.3.2.

<sup>16</sup> See Section 1.3.

<sup>17</sup> At the Advisory Committee of 27 April 2017 all Member States present unanimously agreed that two infringements can be established and that accordingly fines should be imposed pursuant to Article 14(1)(a) and 14(1)(b) of the Merger Regulation. . At the Advisory Committee of 11 May 2017 all Member States present unanimously agreed with the factors taken into consideration by the Commission for the purposes of determining the level of the fines to be imposed and with the actual level of the fines proposed by the Commission.

<sup>18</sup> Existing WA users were given the chance to opt out of the Update. Existing WA users who had chosen to accept the Update were given an additional 30 days to change their choice by modifying WA's account settings. After expiry of that additional 30-day period, their choice became irrevocable. The updated privacy policy applies automatically to new WA users. [...]. See, in this regard, the reply to the Commission's RFI No. 3, questions 24 and 25.

<sup>19</sup> See the Second Briefing Paper, p. 12-13; the reply to RFI No. 1, question 10; the reply to the Commission's RFI No. 3, question 29.

- (ii) [...];
- (iii) [...];
- (iv) improved FB user experience by making more accurate suggestions of other friends to connect with on FB (so called "people you might know" recommendations); and
- (v) [...]"<sup>20</sup>

#### 1.6. Form of user matching pursued by Facebook (the Phone ID Matching Solution)

(49) In the Second Briefing Paper, Facebook explained that there are different technological approaches to match user accounts.<sup>21</sup> It explained that the approach that it has selected to match FB and WA user accounts in connection with the Update is based on the use of a common identifier across the user's different accounts.<sup>22</sup> The common identifier is to be the Phone ID, a 128 bit unique string that is associated with a user's phone and can therefore be used as a basis to match apps installed on the same phone.<sup>23</sup> The technological approach relying on Phone IDs as the common identifier to match user accounts is referred to hereinafter as "**the Phone ID Matching Solution**".

(50) According to Facebook, implementation of the Phone ID Matching Solution also requires one app installed on a phone to be able to share information with another app installed on the same phone, either directly or indirectly [...].<sup>24</sup> The conditions under which apps may share information with each other are regulated by OS level access controls and may therefore vary according to the OS in question.<sup>25</sup> Facebook explained that this is the reason why the mechanisms that it has devised to enable apps to share the Phone ID with each other and hence to implement the Phone ID Matching Solution differ as follows, according to the OS of the mobile device in question:

- (i) for iOS, the Phone ID Matching Solution relies on a mechanism developed [...].<sup>26</sup> [...]<sup>27</sup> [...].
- (ii) for Android OS, the Phone ID Matching Solution relies on direct communication between apps, in other words [...].<sup>28</sup> The Phone ID is synchronised across apps via an OS level broadcast mechanism that permits the sharing of data directly between apps (provided that each of the apps implements authentication and security mechanisms). Specifically, each app

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<sup>20</sup> [...].

<sup>21</sup> User account matching means reliably associating two (or more) different accounts on different services with a single user. Second Briefing Paper, p. 1.

<sup>22</sup> Second Briefing Paper, p. 1.

<sup>23</sup> Second Briefing Paper, p. 3.

<sup>24</sup> Second Briefing Paper, p. 3. Facebook described [...].

<sup>25</sup> Second Briefing Paper, p. 3.

<sup>26</sup> First Briefing Paper, p. 7. In the First Briefing Paper (p. 7), [...]. However, in the Second Briefing Paper (p. 8) and in its reply to RFI No 1 (question 6, p. 12), [...].

<sup>27</sup> First Briefing Paper, p. 7.

<sup>28</sup> Reply to RFI No. 1, question 5, p. 7.

can directly query other Facebook family apps' Phone IDs in a round robin fashion<sup>29</sup> to update its own Phone ID with the oldest one.<sup>30</sup>

(iii) for Windows OS, [...].<sup>31</sup>

(iv) for other OSs (such as Blackberry, Nokia S40 and Nokia Symbian S60) Facebook submitted that it did not intend to implement the Phone ID Matching Solution because it planned to stop supporting the WA app on these platforms by the end of 2016.<sup>32</sup>

(51) In its reply to RFI No. 1, Facebook also explained that the Phone ID Matching Solution was not engineered for the purpose of cross-platform messaging and that it was not clear whether it would be sufficient to support such functionality, nor did Facebook have any plan to allow cross-platform communication between FBM and WA.<sup>33</sup>

## 2. LEGAL ASSESSMENT

### 2.1. Procedural obligations

(52) Recital 5 of the Implementing Regulation states that: "*It is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration.*"

(53) Article 3(1) of the Implementing Regulation provides that the notifications "*shall be submitted in the manner prescribed by Form CO as set out in Annex I*" and Article 4(1) of that Regulation provides that the information contained in notifications "*shall be correct and complete*". Annex I of the Implementing Regulation (Form CO) requires the following declaration to be signed by or on behalf of all the notifying parties: "*The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by Form CO have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.*"<sup>34</sup>

(54) Point (a) of Article 14(1) of the Merger Regulation allows the Commission to impose fines on the persons referred to in Article 3(1)b of that Regulation, undertakings or associations of undertakings "*where, intentionally or negligently:*

(a) *they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3)*".

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<sup>29</sup> That is to say, an arrangement that chooses all elements in a group equally in some rational order, usually from the top to the bottom of a list and then starts again at the top of the list and so on.

<sup>30</sup> Reply to RFI No. 1, question 5, p. 7.

<sup>31</sup> Reply to RFI No. 2, question 8 b., c. and d., p. 7-8

<sup>32</sup> Reply to RFI No. 2, question 8 a., p. 7-8.

<sup>33</sup> Reply to RFI No. 1, question 11 and footnote 14. In its reply to RFI No. 1 Facebook also identified several accuracy shortcomings that make it unlikely that the Phone ID Matching Solution would be suitable to support cross-platform messaging, such as the fact that the solution does not take into account cases involving multiple FBM users sharing a single device nor platforms where the Phone ID Matching Solution is not available.

<sup>34</sup> Implementing Regulation, Annex I, Form CO relating to the notification of a concentration pursuant to Regulation (EC) No 139/2004, Section 11.

(55) Point (b) of Article 14(1) of that Regulation allows the Commission to impose fines on those persons, undertakings or associations of undertakings "*where, intentionally or negligently:*

(b) *they supply incorrect or misleading information in response to a request made pursuant to Article 11(2)".*

## 2.2. Infringement

(56) Within the legal framework referred to in Section 2.1 and on the basis of the evidence contained in the case file, the Commission considers that, with respect to the possibility of matching FB IDs automatically with WA users' mobile phone numbers, Facebook, Inc. has:

(i) at least negligently supplied incorrect or misleading information in a notification made pursuant to Article 4 of the Merger Regulation in the context of Case No. M.7217 – *Facebook/WhatsApp*, and

(ii) at least negligently supplied incorrect or misleading information in response to a request made pursuant to Article 11(2) of the Merger Regulation in the context of Case No. M.7217 – *Facebook/WhatsApp*.

(57) The Commission's analysis in reaching these conclusions is set out in the recitals in this Section.

(58) The Commission's conclusions set out in this Decision are based on evidence collected from the case file in Case No. M.7217 – *Facebook/WhatsApp*<sup>35</sup> as well as on subsequent submissions and replies to the RFIs made by the Commission referred to in recitals (31), (33) and (36).

### 2.2.1. Facts

#### 2.2.1.1. Information provided in relation to user matching possibilities during the Merger Review Proceedings

(59) Both before and after the formal notification, the Commission asked the Parties questions about the possibility of matching FB and WA accounts. The Commission's questions and the statements provided by the Notifying Party in response to those questions are summarised in recitals (60) to (64).

(i) *Pre-notification discussions and the final Form CO*

(60) During the pre-notification discussions, the Commission raised the issue of whether "[p]ost-acquisition, [the Notifying Party was] *planning to link/match in any way customers' profiles on WhatsApp with these customers' profiles on Facebook (e.g. by linking customers' mobile numbers from WhatsApp to these customers' Facebook accounts)*".<sup>36</sup>

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<sup>35</sup> All correspondence between the Commission and the Parties (or any one of the Parties) in the context of Case No. M.7217 – *Facebook/WhatsApp* from 7 March 2014 (that is, the date of initiation of pre-notification contacts) has been included in the case file relating to this investigation. In particular, this includes the Parties' responses to the questions pre-notification and to the RFIs made pursuant to Article 11 of the Merger Regulation, all other emails (including attachments) exchanged between the Parties (or any of them) and the Commission, as well as other submissions addressed by the Parties (or any of them) to the Commission.

<sup>36</sup> Question 5 of the questions sent by the Commission on 25 August 2014.

(61) In the final Form CO,<sup>37</sup> Facebook, Inc. made the following statement regarding the possibility of cross-platform user matching: *"providing seamless cross-platform functionality – enabling WhatsApp users to reliably send and receive messages from Facebook users and vice versa – would likely require substantial re-engineering of the services and re-writing of their code [...]. WhatsApp's users' IDs consist of unique mobile phone numbers [...]. Facebook users must register and create a Facebook ID (which is not a mobile phone number), a password, and a profile [...]. These meaningfully different "identifiers" used by Facebook and WhatsApp pose a significant engineering hurdle to reliable cross-platform communication between these two distinctly architected services [...]. Facebook cannot reliably associate a Facebook ID with a unique and valid phone number [...]. Even if Facebook were, contrary to its current plan, to attempt to enable cross-platform communication between WhatsApp and Facebook Messenger, Facebook would need to significantly re-engineer the app code and the database backend such that it provides a mechanism to match users across platforms."*<sup>38</sup>

(ii) Phase I investigation

(62) After formal notification, during the Phase I investigation, the Commission received the Third Party Paper. The Third Party Paper contained statements concerning the possibility of Facebook aggregating user data between FB and WA using a "gateway" between the FB and WA "platforms" enabling cross-platform messaging, *"without [the user] having to take any action"*, or by "federating"<sup>39</sup> users' profiles with *"a minimum user interaction required to grant Facebook access to the Whatsapp [sic] user ID (phone number)"*.

(63) In the RFI of 18 September 2014, the Commission requested the Parties to *"explain and substantiate whether [the Third Party Paper] accurately represent[ed] the technical ability (and incentive) of Facebook to integrate WhatsApp post-merger"* as well as to *"provide any other comments [it] consider[ed] relevant"*.<sup>40</sup>

(64) In the Reply of 23 September 2014, the Parties submitted that *"[t]he matching [of WhatsApp and Facebook users] would need to be done manually, by the users themselves - Facebook users would have to enter, validate and update their mobile*

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<sup>37</sup> The fact that the response to question 5 of the questions sent by the Commission on 25 August 2014 was incorporated in the final Form CO is evidenced by the email of Facebook, Inc.'s legal representative to the Commission's services on 28 August 2014 at 4:03 PM CET, "RE: M7217 - list of issues still to be addressed – confidential": *"As anticipated on Monday, we are on track to file (having incorporated responses to your various follow-up questions in the Form CO) tomorrow"*.

<sup>38</sup> Form CO, paragraphs 304-309.

<sup>39</sup> Federation of user accounts or profiles is a means of linking a person's electronic identity stored across multiple distinct IT systems.

<sup>40</sup> RFI of 18 September 2014. This RFI was sent by the Commission to the Parties' legal representatives on 18 September 2014 at 7.12 p.m. by email entitled "M.7217 - Facebook/WhatsApp - Request for Information". It contained the following statement: *"Please note that this is a formal request pursuant to Article 11 (2) of Council Regulation (EC) No. 139/2004 (the "Merger Regulation"). You will not receive any separate letter or fax. Please note that Article 14 of the Merger Regulation provides for penalties up to 1% of the aggregate turnover of the undertaking concerned for supplying incorrect or misleading information as a response to a request pursuant to Article 11 (2) of the Merger Regulation."* In the email, the Commission also explained that the question had arisen as *"[i]n the course of the market investigation, [the Commission had] received [a] submission from a third party regarding the options for technical integration between Facebook and WhatsApp"*, i.e. the Third Party Paper, which was attached to the RFI of 18 September 2014.

*phone numbers or WhatsApp users would need to register with Facebook and create Facebook IDs and profiles.... The “one time federation effort” to which the Paper rather disingenuously refers would require significant effort relating to hundreds of millions of users, and its success or failure would rest in the hands of users, not Facebook, which means that in all likelihood Facebook would be unable to match accounts for a material proportion of users.”<sup>41</sup> Moreover, the Parties stated that “The issue is whether Facebook knows the one thing about the user (other than name) that WhatsApp also knows – the user’s current mobile phone number(s). Nothing else in a user’s Facebook profile will enable matching, and WhatsApp stores very little user data beyond the mobile phone numbers in the user’s handset’s native address book. The Paper baldly [sic] asserts that “[t]heir [sic] is minimum user interaction required to grant Facebook access to the WhatsApp user ID”. This is simply not true. Because it is not possible to “match” Facebook IDs with each WhatsApp mobile phone number ID associated with the individual user on an automated basis, the matching would need to be done manually, by users”.<sup>42</sup>*

2.2.1.2. Information provided during the Current Proceedings as to the availability of the Phone ID Matching Solution during the Merger Review Proceedings

- (65) The information provided by Facebook during the Current Proceedings about the availability of the Phone ID Matching Solution at the time of the Merger Review Proceedings is summarised below. This information is derived both from Facebook's written submissions to the Commission<sup>43</sup> and from Facebook's internal documents supplied as part of its reply to RFI No. 1.<sup>44</sup>
- (66) At the time when the final Form CO and the Reply of 23 September 2014 were being submitted, during the Merger Review Proceedings, Facebook personnel were exploring ways to match IG and FB users. To that end, they were discussing the possibility of matching users based on Phone IDs and they had already identified the Phone ID Matching Solution, the solution which lies at the core of the user matching approach pursued by Facebook in connection with the Update.
- (67) However, the extent to which the Phone ID Matching Solution was available in 2014, and particularly at the time of the Merger Review Proceedings, was not the same for the two main types of OS (iOS and Android OS).<sup>45</sup>

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<sup>41</sup> Reply of 23 September 2016, p. 1

<sup>42</sup> Reply of 23 September 2016, pp. 5-6.

<sup>43</sup> First Briefing Paper, submitted on 30 June 2016; reply to RFI No. 1, submitted on 3 August 2016; Second Briefing Paper, submitted on 3 August 2016; reply to the Commission's RFI No. 2, submitted on 16 August 2016; Third Briefing Paper, submitted on 7 September 2016.

<sup>44</sup> Facebook's internal documents FX\_00016656 to FX\_00016657; FX\_00015373 to FX\_00015386; FX\_00015426; FX\_00015425; FX\_00015498; FX\_00015496; FX\_00015747 to FX\_00015748; FX\_00015495; FX\_00015949 to FX\_00015954; FX\_036; FX\_00003441; FX\_00016450; FX\_00015360 to FX\_00015367; FX\_00015333; FX\_00003417; FX\_00025266 to FX\_00025268; FX\_129; FX\_052.

<sup>45</sup> As explained in recital (80), at the time of the Merger Review Proceedings, Android OS and iOS together accounted for at least 80% of smartphone operating systems in the EEA. Given their limited significance at the time of the Merger Review Proceedings, Windows OS and the other OSs (such as Blackberry, Nokia S40 and Nokia Symbian S60) will not be discussed further in this Decision. Moreover, as regards Windows OS, Facebook submitted that it had not conducted the technical due diligence to implement the Phone ID Matching Solution (see recital (50)(iii)) and, as regards other OSs, Facebook submitted that it did not intend to implement the Phone ID Matching Solution because it planned to stop supporting WA app on these platforms by the end of 2016 (see recital (50)(iv) above).



- (68) With respect to Android OS devices, during the Merger Review Proceedings, Facebook personnel had identified a mechanism to implement the Phone ID Matching Solution without having to change the apps' publisher.<sup>46</sup>
- (69) With regard to iOS devices, during the Merger Review Proceedings,<sup>47</sup> Facebook personnel were aware of the possibility of implementing the Phone ID Matching Solution by changing the apps' publisher.
- (70) Furthermore, although the efforts being made by Facebook personnel to enable user matching were specifically aimed at matching FB and IG accounts, the Phone ID Matching Solution and the mechanisms needed to implement it on the different OSs were (and are) potentially applicable to any app belonging to Facebook. Indeed, during the Merger Review Proceedings, Facebook personnel were considering implementing the Phone ID Matching Solution to match users automatically across FB and WA once WhatsApp Inc. was acquired by Facebook.<sup>48</sup>
- (71) In addition, although Facebook's efforts were specifically aimed at matching FB and IG accounts for de-duplicating purposes<sup>49</sup>, the Phone ID Matching Solution and its implementing mechanisms could equally be used to match users across Facebook apps for other purposes (such as advertising purposes).

### 2.2.2. *Facebook's views*

- (72) In the SO Response, Facebook acknowledged the essence of the facts described in Section 2.2.1 of this Decision.<sup>50</sup> Moreover, it acknowledged that, in responding to both of the questions asked by the Commission detailed in Section 2.2.1.1, it interpreted those questions as relating to the possibility of conducting automatic user matching across the FB and WA user bases to enable cross-platform integration or cross-platform messaging between the two services.<sup>51</sup>
- (73) Facebook also acknowledged that, based on its interpretation of those questions, it did not [...] disclose to the Commission the fact that [...] certain personnel [...], were [...] aware of the possibility and investigating the feasibility of relying on the Phone ID Matching Solution to match FB and IG users automatically for the purposes, inter alia, of de-duplicating users across the Facebook family of apps (but not for the purposes of enabling cross-platform integration or messaging, which would require a higher confidence level in matching users across services).<sup>52</sup> In particular, according to Facebook, these personnel had identified a mechanism whereby they believed that they would be able to implement the Phone ID Matching Solution with regard to Android OS devices without the need to change the apps' publisher, and were aware of the possibility of implementing the Phone ID Matching

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<sup>46</sup> For the precise dates on which this mechanism was first identified, see Facebook's submissions and internal documents cited in footnotes 41 and 42.

<sup>47</sup> For the precise dates on which this possibility was first identified, see Facebook's submissions and internal documents cited in footnotes 41 and 42.

<sup>48</sup> For the precise dates on which this was first considered, see Facebook's submissions and internal documents cited in footnotes 41 and 42.

<sup>49</sup> That is to say, to avoid counting twice a customer who has accounts, for example, on both FB and IG.

<sup>50</sup> SO Response, paragraphs 5-7 and 9-10.

<sup>51</sup> SO Response, paragraph 8.

<sup>52</sup> SO Response, paragraph 9.

Solution with regard to iOS devices subject to undertaking the process of changing the apps' publisher.<sup>53</sup>

- (74) In addition, Facebook recognised that, although the efforts made by Facebook personnel described in recital (73) were specifically aimed at matching FB and IG accounts for de-duplicating purposes, the Phone ID Matching Solution and its implementing mechanisms (i) were potentially applicable to any app belonging to Facebook (and, indeed, during the Merger Review Proceedings, Facebook personnel were considering implementation of the Phone ID Matching Solution to match users across FB and WA automatically once WhatsApp Inc. was acquired by Facebook); and (ii) were later determined by Facebook to be sufficient to enable automatic user matching for purposes other than de-duplicating, such as advertising purposes (but were not determined to be sufficient for the purposes of enabling cross-platform integration or messaging).<sup>54</sup>
- (75) Furthermore, Facebook acknowledged that it did not make sufficiently clear in the final Form CO and the Reply of 23 September 2014 that its description of the difficulties of automatic user matching across user bases applied solely to the type of user matching required for the purposes of enabling cross-platform integration or messaging, and did not apply to user matching more generally, for example, to user matching for the purposes of de-duplicating users across the Facebook family of apps.<sup>55</sup> Moreover, Facebook acknowledged that the narrow construction it adopted in the interpretation of the Commission's questions did not adequately respond to those questions, which related to the possibility of user matching in general, not merely to user matching required for the purposes of enabling cross-platform integration or messaging.<sup>56</sup>
- (76) Lastly, Facebook acknowledged that the information it provided to the Commission was incorrect or misleading within the meaning of Article 4(1) of the Implementing Regulation and Article 14(1) of the Merger Regulation and that its conduct was negligent within the meaning of Article 14(1) of the Merger Regulation.<sup>57</sup>

### 2.2.3. *Commission's assessment*

- (77) The Commission considers that (i) the information provided by Facebook in the final Form CO and in the Reply of 23 September 2014 with respect to the possibility of matching FB IDs automatically with WA users' mobile phone numbers was incorrect or misleading; and (ii) Facebook supplied such incorrect or misleading information at least negligently. Each of these two points is analysed below.

#### 2.2.3.1. The information provided by Facebook, Inc. in relation to user matching possibilities during the Merger Review Proceedings was incorrect or misleading

- (78) According to the ordinary meaning of the terms, "incorrect" or "misleading" information within the context of Article 14 of the Merger Regulation is to be understood as meaning information that deviates from what is, to the best of the

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<sup>53</sup> SO Response, paragraph 9.

<sup>54</sup> SO Response, paragraph 10.

<sup>55</sup> SO Response, paragraph 11.

<sup>56</sup> SO Response, paragraph 12.

<sup>57</sup> SO Response, paragraph 13.

knowledge and belief of the undertakings supplying the information to the Commission, true, correct and complete.<sup>58</sup>

- (79) In concluding that the information provided in the final Form CO and in the Reply of 23 September 2014 was incorrect or misleading within the meaning of Article 14(1)(a) and (b) of the Merger Regulation and Article 4(1) of the Implementing Regulation, the Commission takes into account the points set out in recitals (80) to (84).
- (80) First, as explained in Section 2.2.1.2, at the time of the Merger Review Proceedings, it was already technically possible to automatically match users' profiles of different apps. This was true at least for Android OS, but it was also true for iOS provided the apps had the same publisher. In this regard, the Commission notes that, at the time of the Merger Review Proceedings, Android OS accounted for at the very least 60% of smartphone operating systems in the EEA, while iOS accounted for around 20%.<sup>59</sup>
- (81) Second, despite the availability of these automated matching solutions, as illustrated in Section 2.2.1.1, in the final Form CO Facebook, Inc. stated that user matching between FB and WA would either have to be done manually by FB/WA users, and would therefore be insufficient and unreliable, or it would require significant re-engineering by Facebook of the apps' code. Moreover, in the Reply of 23 September 2014, Facebook, Inc. submitted that user matching could not be done automatically and would need to be done manually.
- (82) Third, the Commission's question referred to in recital (60) during the pre-notification discussions was clear and specifically referred to the possibility of user matching in general, not merely user matching required for the purposes of enabling cross-platform integration or messaging. Likewise, the Commission's question in the RFI of 18 September 2014 referred to in recital (63) covered the entirety of the Third Party Paper, including the integration option based on federation of users' profiles.<sup>60</sup> Therefore, a reply to those questions that was correct and not misleading would not have been limited to discussing user matching for cross-platform communication purposes or at least, if it was limited to user matching for cross-platform communication purposes, its scope should have been clearly specified.
- (83) In this respect, the Commission notes that, in the SO Response, Facebook acknowledged that the Commission's questions related to the possibility of user matching in general and not merely to user matching required for the purposes of

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<sup>58</sup> See Article 4, and Section 11 of Annex I, of the Implementing Regulation. See also Recital 5 of the Implementing Regulation, cited supra.

<sup>59</sup> Based on the reply to RFI No.1, Annex. The source of the user base figures and the share estimates provided in the reply to RFI No.1 is the "*Strategy Analytics for 2013 – Global Smartphone User Base Forecast by OS for 88 Countries: 2007-2017*", of June 2013 (the basis for the multi-homing, app usage and frequency of use data provided in the Form CO). It appears that these figures are highly conservative as they constitute ex ante estimates and are much lower than the other dataset publicly available. For example, Facebook's estimates of Android OS and iOS shares in the EEA are much lower than in Kantar Worldpanel ComTech's "*Smartphone OS sales market share*" (available at <http://www.kantarworldpanel.com/global/smartphone-os-market-share/>), which is based on the research extracted from the Kantar Worldpanel ComTech global consumer panel and refers to 3-month periods ending with the stated month. Indeed, according to Facebook's estimates, Android OS's shares in 2014 in Italy, France, Spain, Germany and the United Kingdom were respectively 59.4%, 55.9%, 67.1%, 58.1% and 50.9% while, according to Kantar Worldpanel ComTech, those shares stood respectively at 73%, 76.2%, 88.1%, 83.2% and 59.3%.

<sup>60</sup> See recital (62).

enabling cross-platform integration or messaging<sup>61</sup>, and that it did not make sufficiently clear in the final Form CO and in the Reply of 23 September 2014 that its description of the difficulties of automatic user matching across user bases applied solely to the type of user matching required for the purposes of enabling cross-platform integration or messaging and did not apply to user matching more generally.<sup>62</sup>

- (84) Finally, the Commission notes that, in the SO Response, Facebook acknowledged that the information it provided to the Commission was incorrect or misleading within the meaning of Article 14(1)(a) and (b) of the Merger Regulation and Article 4(1) of the Implementing Regulation.<sup>63</sup>

2.2.3.2. Facebook, Inc. acted at least negligently

- (85) In concluding that Facebook, Inc. acted at least negligently, the Commission takes into account the points set out in recitals (86) to (91).

- (86) First, at the time of the Merger Review Proceedings and, in particular, when submitting the final Form CO (on 29 August 2014) and the Reply of 23 September 2014, Facebook was or should have been aware that automated matching between a user's FB and WA accounts was or would become possible. In particular, at the time of submitting the final Form CO and the Reply of 23 September 2014:

- (i) Facebook personnel were aware of the possibility, and were investigating the feasibility, of relying on the Phone ID Matching Solution to match FB and IG users automatically;
- (ii) Facebook personnel had identified a mechanism to implement the Phone ID Matching Solution on Android OS devices without having to change the apps' publisher;
- (iii) Facebook personnel were aware of the possibility of implementing the Phone ID Matching Solution on iOS devices subject to the need to change the apps' publisher;
- (iv) although Facebook personnel's efforts to enable user matching were specifically aimed at matching FB and IG accounts, the Phone ID Matching Solution and its implementing mechanisms were potentially applicable to any app belonging to Facebook. This is also confirmed by the fact that Facebook envisaged implementing the Phone ID Matching Solution to match users across FB and WA automatically once WhatsApp Inc. was acquired by Facebook; and
- (v) while Facebook personnel's efforts were specifically aimed at matching accounts for de-duplicating purposes, the Phone ID Matching Solution and its implementing mechanisms could equally be used to enable automatic user matching for other purposes, such as for advertising purposes (as Facebook was subsequently planning to do in connection with the Update).

- (87) The Commission notes that each of the facts mentioned under points (i)-(v) of recital (86) have been specifically acknowledged by Facebook, as explained in recitals (72) and (74).

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<sup>61</sup> SO Response, paragraph 12.

<sup>62</sup> SO Response, paragraph 11.

<sup>63</sup> SO Response, paragraph 13.

- (88) Second, as acknowledged by Facebook,<sup>64</sup> the questions asked by the Commission – in particular, during the pre-notification discussion and in the RFI of 18 September 2014 – were by no means limited to the purpose of cross-platform communication.<sup>65</sup>
- (89) Third, Facebook, Inc. had been explicitly informed about the importance of supplying information that was correct and not misleading, and warned about the possibility of fines. By signing the final Form CO, Facebook, Inc.'s legal representative declared that, to the best of her knowledge and belief, the information given in the notification was true, correct, and complete and that she was aware of the provisions of Article 14(1)(a) of the Merger Regulation.<sup>66</sup> Moreover, the RFI of 18 September 2014 (to which the Parties responded with the Reply of 23 September 2014) made it clear that this was a formal request pursuant to Article 11(2) of the Merger Regulation and that Article 14 of that Regulation provided for penalties for supplying incorrect or misleading information.<sup>67</sup> It follows that the Parties were aware of their obligations under the Merger Regulation and of the consequences they were facing.
- (90) In light of all these points, the Commission concludes that the incorrect or misleading information was supplied as a result of conduct which was at least negligent on the part of Facebook, Inc.<sup>68</sup>
- (91) The Commission also notes Facebook's acknowledgment that its conduct was negligent within the meaning of Article 14(1) of the Merger Regulation.<sup>69</sup>

### **2.3. Conclusion**

- (92) In conclusion, the Commission considers that, with respect to the possibility of matching FB IDs automatically with WA users' mobile phone numbers, Facebook, Inc.:
- (i) at least negligently supplied incorrect or misleading information in the final Form CO in Case No. M.7217 – *Facebook/WhatsApp*, and
  - (ii) at least negligently supplied incorrect or misleading information in the Reply of 23 September 2014 provided in response to the RFI of 18 September 2014 made pursuant to Article 11(2) of the Merger Regulation in Case No. M.7217 – *Facebook/WhatsApp*.

### **3. DECISION TO IMPOSE FINES**

- (93) Article 14(1) of the Merger Regulation states that in the case of intentional or negligent conduct of a kind described in points (a) to (f) of that Article: "*[t]he Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1% of the aggregate turnover of the undertaking or association of undertakings concerned*

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<sup>64</sup> See recitals (82) and (83).

<sup>65</sup> Regarding Facebook's acknowledgment of this, see recital (83).

<sup>66</sup> The final Form CO submitted on 29 August 2014, including Section 11, was signed on behalf of the Notifying Party by Facebook, Inc.'s legal representative. For the content of Section 11, see recital (52).

<sup>67</sup> See footnote 38.

<sup>68</sup> As part of the reply to RFI No. 1, no internal document of WhatsApp, Inc. was submitted to the Commission.

<sup>69</sup> See recital (76).

*within the meaning of Article 5*". In this regard, the Commission notes that Facebook, Inc.'s 2016 turnover amounted to EUR 24 968.83 million.<sup>70</sup>

- (94) The Commission considers that the conduct described in points (i) and (ii) of recital (92) constitutes two separate infringements<sup>71</sup> and that, therefore, fines should be imposed on Facebook, Inc.<sup>72</sup> for each of those two infringements in accordance with Article 14(1)(a) and Article 14(1)(b) of the Merger Regulation.<sup>73</sup>
- (95) The Commission notes that, under Article 1 of Council Regulation (EEC) No 2988/74,<sup>74</sup> in the case of infringements of provisions concerning notifications of undertakings or associations of undertakings or requests for information, the limitation period for the Commission to pursue an infringement is three years. Furthermore, Article 2 of that Regulation provides that any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period in proceedings. The infringements in this case took place on 29 August 2014 (when the final Form CO was notified) and on 23 September 2014 (when the reply to the RFI of 18 September 2014 was submitted),<sup>75</sup> that is to say less than three years before the date of adoption of this Decision. Moreover, the limitation period was interrupted by RFI No. 1, which the Commission sent to the Parties on 28 July 2016. Therefore, the two infringements identified in this Decision are not time-barred and fines can be imposed.
- (96) As regards the appropriate level of the fines to be imposed on Facebook, Inc., Article 14(3) of the Merger Regulation provides that “[i]n fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement”. Each of these elements is assessed in turn in the following.

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<sup>70</sup> According to its annual report (available at: <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/80a179c9-2dea-49a7-a710-2f3e0f45663a.pdf>, page 31), Facebook, Inc.'s 2016 turnover amounted to USD 27 638 million, equal to EUR 24 968.83 million (conversion using the average ECB exchange rate during 2016, namely 1 EUR = USD 1.1069, see [https://www.ecb.europa.eu/stats/policy\\_and\\_exchange\\_rates/euro\\_reference\\_exchange\\_rates/html/eurofxref-graph-usd.en.html](https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-usd.en.html)).

<sup>71</sup> The fact that the underlying factual issues about which the incorrect or misleading information was provided are essentially the same is irrelevant.

<sup>72</sup> See Section 3.6.

<sup>73</sup> The Commission notes that the imposition of fines for the supply of incorrect or misleading information in notifications and in responses to RFIs in merger proceedings is not unprecedented and that it has imposed fines on these grounds in several cases. See Cases No. M.1543 - *Sanofi/Synthelabo*, Commission's decision of 28 July 1999, M.1608 - *KLM/Martinair*, Commission's decision of 14 December 1999, M.1610- *Deutsche Post/ Trans-O-Flex*, Commission's decision of 14 December 1999, M.2624 - *BP/Erdölchemie*, Commission's decision of 19 June 2002, M.3255 - *Tetra Laval/Sidel*, Commission's decision of 7 July 2004.

Likewise, finding two separate infringements and imposing two separate fines is consistent with previous Commission decisions concerning the supply of incorrect or misleading information in notifications and requests for information (see for example *Deutsche Post/ Trans-O-Flex* and *Tetra Laval/Sidel*).

<sup>74</sup> Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

<sup>75</sup> See recital (101).

### 3.1. The nature of the infringements

- (97) The Commission considers that the two infringements committed by Facebook, Inc. are of a serious nature. The obligation to provide information that is correct and not misleading in a merger investigation is essential for the Commission to be able to review mergers effectively. A notification form is an essential source of information for the Commission and is the starting point for its investigation. The same also applies to information requested pursuant to Article 11(2) of the Merger Regulation, as RFIs are an indispensable tool for the Commission to gather the necessary facts and information not only for the proper assessment of third party claims (which in this case were the background to the RFI of 18 September 2014) but also for the overall assessment of the impact of a transaction. Therefore, the provision of incorrect or misleading information in a notification form or in replies to RFIs is in itself a serious infringement because it prevents the Commission from having information necessary to assess a transaction. Under the tight deadlines of a merger investigation, it is particularly important that the Commission can rely on the accuracy of the information provided, in particular by the notifying parties.<sup>76</sup> This principle is set out also in the preamble to the Implementing Regulation, which states at recital 5: "[i]t is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration."

### 3.2. The gravity of the infringements

- (98) As regards the gravity of the two infringements committed by Facebook, Inc., the Commission notes the following.
- (99) First, as explained in detail in recital (90), the Commission considers that the incorrect or misleading information was supplied by Facebook, Inc. at least negligently.
- (100) Second, in the questions put to it by the Commission on 25 August 2014, Facebook, Inc. was asked to include information about its plans for linking or matching FB and WA user bases. Therefore, Facebook, Inc. was made well aware of the fact that that information was necessary for the Commission's assessment of the Transaction. Likewise, through the RFI of 18 September 2014, Facebook, Inc. was made well aware of the fact that the information requested in that RFI was necessary for the Commission's assessment of the Transaction, particularly in light of the third party claims. Nonetheless, the Commission notes that, albeit relevant, the incorrect or

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<sup>76</sup> As regards the provision of incorrect or misleading information in the notification form, see Cases No. M.2624 - *BP/Erdölchemie*, Commission's decision of 19 June 2002, recital 48 and M.3255 - *Tetra Laval/Sidel*, Commission's decision of 7 July 2004, recital 108.

As regards the provision of incorrect or misleading information in the response to an RFI pursuant to Article 11(2) of the Merger Regulation, see Case No. M.3255 - *Tetra Laval/Sidel*, Commission's decision of 7 July 2004, recitals 109 and 110.

See also recital 38 of the Merger Regulation stating that, "[i]n order properly to appraise concentrations, the Commission should have the right to request all necessary information." Such power would be meaningless if the information received by the Commission could be incorrect or misleading.

misleading information provided by Facebook, Inc. did not have any impact on the outcome of the Article 6(1)(b) Decision.<sup>77</sup>

### **3.3. The duration of the infringements**

(101) In line with its practice,<sup>78</sup> the Commission considers that the supply of incorrect or misleading information is by its nature an instantaneous infringement, which is committed at the very moment the incorrect or misleading information is supplied to the Commission. In this case, the Commission considers that Facebook, Inc. committed two infringements in two specific instances, namely on 29 August 2014 (when the final Form CO was notified) and on 23 September 2014 (when the reply to the RFI of 18 September 2014 was submitted).

### **3.4. Mitigating circumstances**

(102) The Commission considers that the cooperative behaviour shown by Facebook in the course of the Current Proceedings<sup>79</sup> is a mitigating factor in the determination of the amount of the fines. Indeed, in June 2016, Facebook, Inc. proactively approached the Commission by submitting the First Briefing Paper. Then, in the SO Response, Facebook has acknowledged the essence of the facts and the infringements of Article 4(1) of the Implementing Regulation and Article 14(1) of the Merger Regulation. Moreover, the cooperative behaviour shown by Facebook has allowed for administrative efficiencies in the Current Proceedings.

### **3.5. Aggravating circumstances**

(103) The Commission has not identified any aggravating circumstances in the Current Proceedings.

### **3.6. Liability**

(104) The Commission considers that Facebook, Inc., but not WhatsApp Inc., is liable for both infringements for the following reasons.

(105) First, the notification of the Transaction was prepared and submitted by Facebook, Inc. and the declaration at the end of the final Form CO was signed by Facebook, Inc.'s legal representative.<sup>80</sup>

(106) Second, even though the RFI of 18 September 2014 was addressed to the legal representatives of both Parties and the Reply of 23 September 2014 was submitted on behalf of both Parties,<sup>81</sup> the evidence presented in Section 2.2.1.2 indicates that the relevant information lay in Facebook's sphere of influence.<sup>82</sup>

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<sup>77</sup> See Case No. M.7217 – *Facebook/WhatsApp*, Commission's decision of 3 October 2014, sections 5.1, 5.2 and 5.3.

<sup>78</sup> See Cases No. M.1543 - *Sanofi/Synthelabo*, Commission's decision of 28 July 1999, M.1608 - *KLM/Martinair*, Commission's decision of 14 December 1999, M.1610 - *Deutsche Post/Trans-O-Flex*, Commission's decision of 14 December 1999, M.2624 - *BP/Erdölchemie*, Commission's decision of 19 June 2002, M.3255 - *Tetra Laval/Sidel*, Commission's decision of 7 July 2004.

<sup>79</sup> As explained in recital (44), the Current Proceedings refer to the period between the First Briefing Paper, submitted on 30 June 2016, and adoption of this Decision.

<sup>80</sup> See footnote 32.

<sup>81</sup> See recital (13).

<sup>82</sup> In particular, no internal document of WhatsApp Inc. was submitted to the Commission as part of the reply to RFI No. 1.



#### 4. AMOUNT OF THE FINES

- (107) When imposing penalties under Article 14 of the Merger Regulation, the Commission takes into account the need to ensure that fines have a sufficiently punishing and deterrent effect.
- (108) Therefore, in order to impose a sufficient penalty for the infringements and deter any recurrence of them, and given the specific circumstances of this case, the Commission considers it appropriate to impose fines under Article 14(1) of the Merger Regulation of the following amounts:
- (i) EUR 55 million for the infringement falling within Article 14(1)(a) of the Merger Regulation and Article 4(1) of the Implementing Regulation, and
  - (ii) EUR 55 million for the infringement falling within Article 14(1)(b) of the Merger Regulation,

HAS ADOPTED THIS DECISION:

##### *Article 1*

Facebook, Inc. has, at least negligently, supplied incorrect or misleading information in a notification made pursuant to Article 4 of Regulation (EC) No 139/2004 in the context of Case No. M.7217 – *Facebook/WhatsApp*.

##### *Article 2*

Facebook, Inc. has, at least negligently, supplied incorrect or misleading information in response to a request made pursuant to Article 11(2) of Regulation (EC) No 139/2004 in the context of Case No. M.7217 – *Facebook/WhatsApp*.

##### *Article 3*

A fine of EUR 55 million is hereby imposed on Facebook, Inc. pursuant to Article 14(1)(a) of Regulation (EC) No 139/2004 for the supply referred to in Article 1 of this Decision.

##### *Article 4*

A fine of EUR 55 million is hereby imposed on Facebook, Inc. pursuant to Article 14(1)(b) of Regulation (EC) No 139/2004 for the supply referred to in Article 2 of this Decision.

##### *Article 5*

The fines imposed by Articles 3 and 4 shall be paid in euro within three months from the date of notification of this Decision to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT  
1-2, Place de Metz  
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000  
BIC: BCEELULL  
Ref.: European Commission – BUFI/M.8228

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where Facebook, Inc. lodges an appeal, it shall cover the fines by the due date either by providing an acceptable financial guarantee or by making a provisional payment of the fines in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.<sup>83</sup>

#### *Article 6*

This Decision is addressed to:

Facebook, Inc.  
1601 Willow Road  
Menlo Park, CA 94025  
United States of America

And

Facebook Ireland Limited  
4 Grand Canal Square Grand Canal Harbour  
Dublin 2  
Ireland

This Decision shall be enforceable pursuant to Article 299 of the Treaty.

Done at Brussels, 17.5.2017

*(Signed)*  
*For the Commission*  
*Margrethe VESTAGER*  
*Member of the Commission*

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<sup>83</sup> Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).