

May 11, 2021

Order of the HmbBfDI: Ban of further processing of WhatsApp user data by Facebook

The Hamburg Commissioner for Data Protection and Freedom of Information (HmbBfDI) issued an order prohibiting Facebook Ireland Ltd. from processing personal data from WhatsApp for its own purposes. The order is immediately enforceable. This is done under the urgency procedure of the General Data Protection Regulation (GDPR), which provides for the adoption of provisional measures with a specified period of validity in the respective territory, in this case Germany.

The background to the proceedings is the request to all WhatsApp users to agree to the new terms and privacy policy by May 15, which grant WhatsApp far-reaching powers to share data with Facebook.

The new terms and conditions formally renew the data processing powers and expand their content for the future. This concerns, among other things, the processing of location information, the transfer of communication data of users to third-party companies explicitly with reference to Facebook, the additional purpose of ensuring the integrity of the services, and the cross-company verification of the account in order to use the service in an "appropriate manner". It also allows for the use of data to connect with products from Facebook companies. A legitimate interest for the data processing or for the exchange of the data in relation to minors is also claimed across the board. Furthermore, the previously existing notice that WhatsApp messages are not shared on Facebook for others to see has been removed.

On evaluation of the facts and after having heard Facebook Ireland Ltd., there is no legal basis for processing by Facebook for its own purposes, notwithstanding the approval of the terms of use currently obtained by WhatsApp. The provisions on data transfers are scattered at different levels of the privacy policy, they are unclear and hard to distinguish in their European and international versions. In addition, the contents are misleading and show considerable contradictions. Even after close analysis, it is not clear what consequences approval has for users. Furthermore, consent is not freely given, since WhatsApp demands acceptance of the new provisions as a condition for the continued use of the service's functionalities.

Against this background, there is no basis for processing of personal data of WhatsApp users by Facebook for their own purpose. In particular, Facebook cannot claim a prevailing legitimate interest in processing the data of WhatsApp users because their interests are overridden by the rights and freedoms of the data subjects. Consent is neither given freely nor in an informed manner. This applies particularly to minors. For these reasons, consent under data protection law cannot be considered as a legal ground. The processing of WhatsApp users' data is also not necessary for Facebook to perform a contract.

The investigation of the new provisions has shown that they aim to further expand the close connection between the two companies in order for Facebook to be able to use the data of WhatsApp users for their own purposes at any time. For the areas of product improvement and advertising, WhatsApp reserves the right to pass on data to Facebook companies without requiring any further consent from data subjects. In other areas, use for the company's own purposes in accordance to the privacy policy

can already be assumed at present. The privacy policy submitted by WhatsApp and the FAQ describe, for example, that WhatsApp users' data, such as phone numbers and device identifiers, are already being exchanged between the companies for joint purposes such as network security and to prevent spam from being sent. Our request to the lead supervisory authority for an investigation into the actual practice of data sharing was not honoured so far.

Users are confronted by WhatsApp with non-transparent conditions for far-reaching data transfer. At the same time, it is claimed that the processing operations described are not actually carried out at all, only to be implemented step by step at a later date on the basis of the legal framework founded on user consent. This strategy is currently being carried out in particular with respect to the newly introduced function of business marketing, which, with the inclusion of Facebook, makes it possible to process data across companies for the purpose of sending direct advertising and marketing communications. Overall, the approach does not comply with the requirements of the GDPR, both with regard to data processing that is already being carried out according to the privacy policy and additional processing that can be implemented by Facebook at any time.

Johannes Caspar, Hamburg's Commissioner for Data Protection and Freedom of Information, comments: "The order is intended to safeguard the rights and freedoms of the many millions of users who approve to the terms of use throughout Germany. The aim is to prevent disadvantages and damage associated with such a black-box procedure. The data protection scandals of recent years, from "Cambridge Analytica" to the recently disclosed data leak that affected more than 500 million Facebook users, show the extent and threats of mass profiling. This concerns fundamental rights and also the possibility of using profiling to influence voter decisions in order to manipulate democratic decision making processes. With nearly 60 million users of WhatsApp, the danger is all the more concrete in view of the upcoming federal elections in Germany in September 2021, which will create desire to influence voters on the part of Facebook's ad customers. The order now issued relates to the further processing of WhatsApp user data and is directed at Facebook. The worldwide criticism against the new terms of service should give reason to fundamentally rethink the consent mechanism once again. Without user trust, no business model based on data can be successful in the long run."

Due to the limited duration of the order in the emergency procedure of only three months, the HmbBfDI will bring this case to the European Data Protection Board (EDPB) in order to facilitate a binding decision at European level.

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