

ARTICLE 29 Data Protection Working Party



Brussels, 24 October 2017

By e-mail: jan@whatsapp.com

Dear Mr Koum,

Further to its letter of 16 December 2016, the WP29 reasserts its concerns regarding the changes to the WhatsApp Terms of Service and Privacy Policy. It further notes that a satisfactory resolution to the issues previously raised has not yet been achieved despite a significant period of time having passed.

The processing of personal data by WhatsApp and the Facebook family of companies affects millions of EU citizens every day. The WP29 calls upon WhatsApp and Facebook to act fairly and transparently towards data subjects, to comply with EU data protection law and to cooperate fully with European data protection authorities.

Without prejudice to the competence of national supervisory authorities acting pursuant to their national laws under Directive 95/46, a taskforce, chaired by the United Kingdom Information Commissioner's Office, has been formed by the WP29. The WP29 calls upon WhatsApp and Facebook to engage positively with the taskforce in order to achieve a satisfactory resolution.

The WP29 notes the new "*Notice for EU users*" published by WhatsApp on 16 August 2017 among the "Frequently asked questions" ("FAQ") on its website.¹ This notice provides certain additional information regarding the nature and purposes of the sharing of personal data by WhatsApp with the Facebook family of companies. The publication of this Notice does not, however, sufficiently address the issues of non-compliance with data protection law. Whilst the WP29 notes that the data protection issues of non-compliance arising in this case have already been clearly explained to both WhatsApp and Facebook, a further explanation of how the actions of the respective parties are considered deficient is detailed below.

Deficiencies in the consent mechanism employed by WhatsApp

The WP29 notes that the legal basis proposed by WhatsApp for the sharing of the data is, or was purported to be, consent. The WP29 has previously published Opinion 15/2011 on the definition of consent², which analyses in detail the elements data controllers need to satisfy in order to rely on consent as a legal ground to process personal data. Directive 95/46 requires such consent to be unambiguous, specific, informed and freely given. Regulation 2016/679 provides further clarification and specification of what is required in order for consent to be considered valid. In particular, it specifies that consent must consist of a statement or clear

¹ <https://faq.whatsapp.com/?lang=en>

² http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp187_en.pdf

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental rights and rule of law) of the European Commission, Directorate General Justice and Consumers, B-1049 Brussels, Belgium, Office No MO59 03/75

Website: http://ec.europa.eu/justice/data-protection/index_en.htm

affirmative action, be demonstrable, clearly distinguishable, intelligible and easily accessible, use clear language and be capable of being withdrawn.

Informed

The WP29 considers that the information presented to users was seriously deficient as a means to inform their consent. The first screen presented to WhatsApp users simply stated:

“WhatsApp is updating our Terms and Privacy Policy to reflect new features like WhatsApp calling. Read our Terms and Privacy Policy and learn more about the choices you have. Please agree to the Terms and Privacy Policy to continue using WhatsApp. If you don’t wish to agree, you’ll need to discontinue using WhatsApp.”

Whilst the WP29 notes there is a balance to be struck between presenting the user with too much information and not enough, the initial screen made no mention at all of the key information users needed to make an informed choice, namely that clicking the agree button would result in their personal data being shared with the Facebook family of companies.

The WP29 further notes that WhatsApp described the update as being put in place to “reflect new features like WhatsApp calling”. The WP29 considers that this gives a misleading impression to the user as to the nature and implications arising from the updated Terms and Privacy Policy.

If users utilised the slide-up mechanism (“Read more about the key updates to our Terms and Privacy Policy”) they were provided with further information and a pre-ticked check-box:

*“Share my WhatsApp account information with Facebook to improve my Facebook ads and products experiences. Your chats and phone number **will not** be shared onto Facebook regardless of this setting”*

The WP29 considers that in this the case the user is still not appropriately informed of the intended collection, processing, or use of the data. It is not clear, for example, what constitutes “WhatsApp account information” nor it is clear what information will be shared with Facebook, and for what purpose. The complete WhatsApp privacy policy also does not provide a clear indication of which types of information may be shared by WhatsApp with the Facebook family of companies for which purpose.

Freely given

As regards the requirement for consent to be ‘freely given’, the WP29 notes the pre-eminence of WhatsApp’s messaging service amongst other similar services, and the extent to which Facebook’s social networking service is embedded into the digital lives of European citizens. The means by which WhatsApp sought to introduce its updated terms of service and privacy policy has, however, effectively resulted in WhatsApp adopting a “take it or leave it” approach in which users either signal their ‘consent’ to the sharing of data or they are unable to avail themselves of WhatsApp’s messaging service: *“If you do not agree to our Privacy Policy, as amended, you must stop using our services”*. For this reason, and having regard to the particular circumstances of this case, the WP29 considers that consent could not be freely given by WhatsApp users in the absence of sufficiently granular user controls allowing for an appropriate level of control over the sharing of the data.

Specific

The WP29 further considers that the consent obtained was insufficiently specific. The WP29 Opinion 15/2011 on the definition of consent makes clear that a blanket consent without specifying the exact purpose of the processing is not acceptable, and that to be specific, consent should refer clearly and precisely to the scope and consequences of the data processing. Further, the consent options offered by WhatsApp should be sufficiently granular to ensure specific consent. Having regard to the particular circumstances of this case, the WP29 considers that individuals should be given the possibility to grant or withhold specific consent for the different purposes for which their data is shared with the Facebook family of companies.

Unambiguous

For consent to be unambiguous, the procedure to seek and to give consent must leave no doubt as to the data subject's intention to deliver consent. By using a pre-ticked check box to seek consent for the use of WhatsApp user data for the purpose of “improving Facebook ads and products experiences”, WhatsApp and Facebook failed to obtain the unambiguous consent of WhatsApp users.

In conclusion, the WP29 draws the attention of WhatsApp and Facebook to the overarching requirement that the processing of personal data must be fair. The lack of transparency and sufficient controls afforded to users indicates that the processing undertaken was not fair to users. The publication of an additional set of FAQs for EU users does not remedy these issues.

The WP29 notes that the requirement for consent to be capable of being withdrawn is an explicit requirement of Regulation 2016/679, and calls on WhatsApp to provide controls allowing for any consent given by the user to be easily withdrawn. The WP29 further notes that Regulation 2016/679 explicitly confirms that pre-ticked boxes do not constitute a valid consent, and further calls upon WhatsApp and Facebook to ensure users are provided with easy to use persistent controls over the sharing of their personal data.

Legitimate interests

Notwithstanding any domestic legal requirement for consent to be obtained for particular processing operations, the WP29 notes that Directive 95/46 and Regulation 2016/679 both provide alternative grounds for the processing of personal data; for example the legitimate interests ground. The WP29 wishes to remind WhatsApp and Facebook that both under Directive 95/46 and Regulation 2016/679 the legitimate interests ground may only be invoked where the processing is *necessary* for the purposes of the legitimate interests pursued by the controller or by a third party, *except* where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

The WP29 draws attention to Opinion 06/2014 on the legitimate interests ground which explains this is bounded by a necessity test and that “...this strictly limits the context in which they can apply... ..Moreover, having an appropriate legal ground does not relieve the data controller of its obligations under Article 6 with regard to fairness, lawfulness, necessity and proportionality, as well as data quality.”

Whilst the sharing of data between WhatsApp and organisations belonging to the Facebook family of companies may, in specific instances and for clearly defined purposes, involve the processing of personal data pursuant to the legitimate interests ground, individuals must be given a clear explanation of the scope of the processing which is to be undertaken, and it must be necessary and proportionate in the circumstances. There must be a real and present interest, and interests that are too vague or speculative will not be sufficient. The legitimate interest ground cannot be relied upon to justify the general combination of user data across services within the Facebook family of companies without adequate user controls and safeguards. Moreover, any sharing with a member of the Facebook family of companies must be narrowly tailored and limited to the sharing of data which is necessary to achieve the specific purpose in question. The WP29 specifically notes the absence of a clear differentiation among the data to be shared in the WhatsApp privacy policy.

Resolution and interaction with the taskforce

Given the impact of these issues on European citizens, the WP29 considers it a matter of utmost importance that a clear, comprehensive resolution is put in place and that the pause in data sharing for the purpose of improving Facebook products and enhancing targeted advertising on Facebook continues until such time as the matter is resolved to the satisfaction of data protection authorities. Equally, the WP29 stresses the urgency of resolving the concerns of WP29 in relation to the other purposes for which WhatsApp shares personal data with the Facebook family of companies.

The WP29 also stresses the importance of WhatsApp and Facebook looking ahead to compliance with Regulation 2016/679.

Without prejudice to any national procedures being undertaken or contemplated by European data protection authorities, the WP29 encourages WhatsApp and Facebook to engage positively with the taskforce in addressing the data protection and privacy concerns set out above. The WP29 invite WhatsApp and Facebook to attend a future meeting of the taskforce in order to set out, in detail, how the concerns raised are to be addressed.

Yours sincerely,

On behalf of the Article 29 Working Party,

Isabelle FALQUE-PIERROTIN
Chairwoman

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