

July 15, 2021

# Data exchange between WhatsApp and Facebook remains unregulated at European level

## European Board sees no urgent need for action

The European Data Protection Board (EDPB) has rejected the request of the Hamburg Commissioner for Data Protection and Freedom of Information (HmbBfDI) to impose definitive measures to prevent data sharing between WhatsApp and Facebook. The Board considered this issue as not being urgent. Also other measures, like warning Facebook to process WhatsApp user data for its own purposes such as product improvement and security without their consent, were not taken. The General Data Protection Regulation (GDPR) provides for a warning as an option in such cases where intended processing operations are likely to violate the GDPR.

The EDPB noted considerable inconsistencies between the information with which WhatsApp users are informed about the extensive use of their data by Facebook on the one hand, and on the other the commitments made by the company to data protection authorities not (yet) to do so. The EDPB also expressed considerable doubts about the legal basis on which Facebook intends to rely when using WhatsApp data for its own or joint processing. It thus takes up essential parts of the argumentation of the HmbBfDI.

Despite these findings, the EDPB has only decided to request the Irish Data Protection Commission (IDPC) as lead supervisory authority for Facebook to conduct an investigation. This is to assess the actual processing operations at Facebook with regard to WhatsApp data and the question of the possible legal basis, in particular the overriding legitimate interest within the meaning of Art. 6 (1) f) GDPR. No deadline has been set for IDPC to do so.

Ulrich Kühn, Hamburg's Deputy Commissioner for Data Protection and Freedom of Information, commented: "The decision of the European Data Protection Board is disappointing. The body, which was created to ensure the uniform application of the GDPR throughout the European Union, is missing the opportunity to clearly stand up for the protection of the rights and freedoms of millions of data subjects in Europe. It continues to leave this solely to the Irish supervisory authority. Despite our repeated requests over more than two years to investigate and, if necessary, sanction the matter of data exchanges between WhatsApp and Facebook, the IDPC has not taken action in this regard. It is a success of our efforts over many years that IDPC is now being urged to conduct an investigation. Nonetheless, this non-binding measure does not do justice to the importance of the issue. It is hard to imagine a case in which, against the background of the risks for the rights and freedoms of a very large number of data subjects and their de facto powerlessness vis-à-vis monopoly-like providers, the

urgent need for concrete action is more obvious. The EDPB is thus depriving itself of a crucial instrument for enforcing the GDPR throughout Europe. This is no good news for data subjects and data protection in Europe as a whole.“

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### **Additional information on the procedure:**

1. The Hamburg Commissioner for Data Protection and Freedom of Information is the competent supervisory authority for Facebook in Germany, as Facebook is nationally established in Hamburg by Facebook Germany GmbH.
2. The Hamburg Commissioner for Data Protection and Freedom of Information nationally is not competent for WhatsApp. This responsibility lies with the Federal Commissioner for Data Protection and Freedom of Information (BfDI).
3. The lead supervisory authority for both Facebook and WhatsApp under the GDPR in Europe is the Irish Data Protection Commission.
4. The ban on the use of German WhatsApp users' data by Facebook for its own purposes, imposed by the Hamburg Commissioner for Data Protection and Freedom of Information by way of an injunction on May 10, 2021, remains in place. It is limited to three months as an interim measure pursuant to Article 66 (1) of the GDPR.
5. For this order, please see our press release dated May 11, 2021, <https://datenschutz-hamburg.de/pressemitteilungen/2021/05/2021-05-11-facebook-anordnung>.
6. The European Data Protection Board (EDPB) is an independent European body, which contributes to the consistent application of data protection rules throughout the European Union. To this end, it is authorized to issue binding decisions in certain cases. Such a decision was requested by the Hamburg Commissioner for Data Protection and Freedom of Information on June 7, 2021 on the basis of Article 66 (2) of the GDPR in order to extend the measures imposed in its order of May 10, 2021 regarding temporal validity and geographical scope.
7. The EDPB issued a press release on this matter, [https://edpb.europa.eu/news/news/2021/edpb-adopts-urgent-binding-decision-irish-sa-not-take-final-measures-carry-out\\_en](https://edpb.europa.eu/news/news/2021/edpb-adopts-urgent-binding-decision-irish-sa-not-take-final-measures-carry-out_en).
8. The Article 66(2) procedure initiated by the HmbBfDI is the first completed urgent procedure since the GDPR came into force in May 2018.