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The prohibition of data sharing between WhatsApp and Facebook ordered by the HmbBfDI is confirmed for the time being – No mass data exchange between Facebook and WhatsApp

On 25 April 2017, the Administrative Court of Hamburg has confirmed with its decision in the preliminary appeal proceedings, that WhatsApp is prohibited to share the data of its German users with Facebook. This is the subject-matter of an order issued by the Hamburg Commissioner for Data Protection and Freedom of Information (HmbBfDI). Facebook Ireland Ltd. was prohibited to collect the phone number and further personal data of WhatsApp users and to store them without obtaining the data subjects' effective consent.

Facebook and WhatsApp are independent companies that process their user's data on the basis of their own Terms and Conditions and Privacy Policies. After the acquisition of WhatsApp by Facebook in 2014, both parties have publicly assured that user data will not be shared between them without the data subjects' effective consent. However, by introducing new Terms of use, WhatsApp informed the users in August 2016, that their data would now also be transferred to Facebook. A choice for the users is not given.

The Hamburg Data Protection Commissioner considers this practice as unlawful and has therefore prohibited the exchange of data by means of an administrative order. To effectively protect the users, the immediate enforcement was ordered. Otherwise there would have been a risk that the data exchange will still be carried out as long as legal remedies are available to Facebook.

Facebook has appealed to the administrative court against the order in the preliminary proceedings. The goal was to repeal the immediate enforcement. The court rejected this request today and clarified the fact that it does not see any legal basis for the planned data exchange. Facebook can not invoke interests of its own business because the complete data exchange is neither necessary for the purpose of network security or business analysis nor for advertising optimization. Furthermore, the court clarifies that there is no effective consent from WhatsApp users for a data exchange with Facebook. As a result, the administrative court is making a clear consideration in the context of the preliminary legal proceedings: the interests of the approximately 35 million German WhatsApp users predominates the economic interest of Facebook in a suspension of immediate enforceability. The question of the applicability of national law is left partly open by the Court, as even in the event that only Irish law should be applicable, EU data protection provisions must be followed. Therefore, Facebook is in any case under obligation to introduce a lawful consent procedure.

Johannes Caspar, the Hamburg Commissioner for Data Protection and Freedom of Information, commented on this: "After this decision there will still be no mass matching of the data of German users between WhatsApp and Facebook. These are good news for millions of users that use the messenger service of Whatsapp on a daily basis in Germany. They are not without protection. The court has presented, in a very clear manner for a preliminary redress procedure, that the planned data exchange is contrary to national data protection laws. This decision also has a significant impact within the EU. After all, a comparable level of data privacy already exists here with the EU Data Protection Directive - and from May 2018 onwards - especially with the General Data Protection Regulation. This also takes into account the criticism of many of my colleagues from the other Member States on the planned data exchange. A bulk transfer of data against the will of those affected will and must not be allowed to

happen in the EU. A lawful and transparent consent procedure, which respects the rights of all persons affected, is the only viable option. We will continue to consequently pursue this approach in the course of the proceedings."

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