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Comment

Between a rock and two hard places: WhatsApp at the crossroad of competition, data protection and consumer law

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A B S T R A C T

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On 11 May 2017, the Italian antitrust and consumer protection authority (Autorità Garante della Concorrenza e del Mercato, or AGCM) adopted two decisions in its proceedings against WhatsApp. Both proceedings, initiated under the consumer protection mandate of AGCM, relate to WhatsApp's terms of service and privacy policy (together referred to as "ToS" hereinafter). In particular, one qualified as "unfair" and "aggressive" WhatsApp's process of obtaining user consent for its updated ToS, while the other established the unfairness of specific clauses of WhatsApp's ToS. This comment will address the former decision, while making reference to other proceedings opened against the consumer communication service or its mother company in relation to its latest ToS update.

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1. Historical and regulatory background

WhatsApp's ToS update in August 2016 was a consequential one: the Californian company announced, buried in the fine print of several provisions it had introduced, that it would share certain data (including most notably the phone number through which users are identified) for marketing purposes and product

improvement with its new mother company Facebook. This attracted the attention and concern of commentators¹ for a number of reasons. First, the new arrangement broke with WhatsApp's longstanding "no ads policy,"² which strictly rejected the use of advertising affirming that "when advertising is involved **you the user** are the product" (emphasis in the original). Secondly, many users felt betrayed also because WhatsApp, adding fuel to the fire, had committed after its acquisition by

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¹ See e.g. Dan Tynan, 'WhatsApp privacy backlash: Facebook angers users by harvesting their data', The Guardian (25 August 2016), <https://www.theguardian.com/technology/2016/aug/25/whatsapp-backlash-facebook-data-privacy-users>; Gennie Gebart, 'What Facebook and WhatsApp's Data Sharing Plans Really Mean for User Privacy', EFF Deeplinks (31 August 2016), <https://www.eff.org/deeplinks/2016/08/what-facebook-and-whatsapps-data-sharing-plans-really-mean-user-privacy-0>; Bryan Barret, 'WhatsApp's Privacy Cred Just Took a Big Hit', Wired (25 August 2016), <https://www.wired.com/2016/08/whatsapp-privacy-facebook/>.

² 'Why we don't sell ads', WhatsApp Blog (18 June 2012), <https://blog.whatsapp.com/245/Why-we-dont-sell-ads?http://dx.doi.org/10.1016/j.clsr.2017.05.018>

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Facebook in 2014 to change “nothing”, stressing that there would have been no partnership with Facebook if that required a compromise on the core principles that define the company, its vision and its product.³

The ToS update was also particularly controversial since the assumption of continued adherence to WhatsApp’s anti-advertising posture played at least some role in the antitrust clearance of the transaction. While the European Commission approved the concentration on different grounds (namely, the dynamic nature of the affected markets and the simultaneous use by consumers of multiple communication services), the investigation did consider the possibility that Facebook would collect data from WhatsApp users who are also on the social network.⁴ Ultimately, however, this scenario was deemed unrealistic given that the required change in WhatsApp’s privacy policy would likely generate a migration of users to other consumer communication services. In addition, the Commission gave some credence to the merging parties’ argument that there would be major technical obstacles to matching a user profile across the two platforms – an argument which is buttressed by the supervened ToS update, and on which the Commission recently fined Facebook €110 million for providing inaccurate information in the course of the merger review.⁵

In the United States, although the proposed acquisition escaped antitrust challenge, a substantiated complaint by the Electronic Privacy Information Center (EPIC) and other civil society organizations⁶ forced the Federal Trade Commission (FTC) to consider the hypothesis that WhatsApp would change its policy after Facebook’s acquisition. FTC Director Jessica Rich responded writing a letter to the merging parties warning about the legal consequences of violating privacy promises.⁷ The letter clarified that a company needs the *express consent* of consumers to be able to use data in a manner that is materially inconsistent with promises made at the time the data was collected, thus aligning the FTC position on the matter with the obligations laid out in the consent decree under which Face-

book recently settled FTC charges of deception.⁸ Unsurprisingly, in light of the discrepancy between the notion of “express consent” and the way in which the ToS update was communicated to WhatsApp users, a further complaint was filed by EPIC together with the Center for Digital Democracy just four days after the announcement of WhatsApp’s ToS update. The FTC assured that it would “carefully review” the matter – but no formal action has been taken to date.⁹

Back to the other side of the Atlantic, the ToS update triggered a number of legal actions in the context of data protection law. In particular, in the first decision taken on the matter on 27 September 2016, the Hamburg Commissioner for Data Protection and Freedom of Information ordered Facebook to stop processing data of German WhatsApp users, due to the absence of an effective consent from WhatsApp users to the data sharing, and the lack of any alternative legal basis for doing so.¹⁰ On the same day, the Italian data protection authority (hereinafter DPA) launched an investigation concerning WhatsApp’s compliance with the purpose limitation principle, as well as to “whether the data of WhatsApp users that do not use Facebook will be disclosed to the Menlo Park company.”¹¹

Just a week later, the Spanish DPA opened its own investigation, probing Facebook specifically on the type of information exchanged received from WhatsApp, the purpose for which it is used, the period of retention, and the options that are offered to users to object.¹² At this point it became clear that, since the concern about Facebook’s practices in relation to WhatsApp was shared by a number of data protection authorities, the case offered a perfect opportunity for joint action under the coordination of the Article 29 Working Party. On 26 October 2016, the Working Party issued a letter to the Menlo Park company detailing the general concern for “the validity of the users’ consent [...] and the effectiveness of control mechanisms offered to users to exercise their rights”, and announcing a coordinated action “to clarify those concerns and to ensure that the principles and rights set forth in European and national Data Protection laws are upheld in a consistent manner across the EU.”¹³ Following

³ ‘Facebook’, WhatsApp blog (19 February 2014), <https://www.whatsapp.com/499/Facebook>.

⁴ European Commission, Press Release IP 14-1088, 3 October 2014, http://europa.eu/rapid/press-release_IP-14-1088_en.htm.

⁵ European Commission, Press Release IP- 17- 1369, 18 May 2017, http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

⁶ *In the Matter of Facebook, Inc.*, (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>; *In the Matter of Facebook, Inc.*, (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief), https://epic.org/privacy/inrefacebook/EPIC_Facebook_Supp.pdf; *In the Matter of Facebook, Inc.*, (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf; *In re Facebook, Inc.*, Decision and Order, No. C-4365 (2012), available at <http://www.ftc.gov/enforcement/cases/proceedings/092-3184/facebook-inc>.

⁷ Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc. (10 April 2014), available at <https://www.ftc.gov/public-statements/2014/04/letter-jessica-l-rich-director-federal-trade-commission-bureau-consumer>.

⁸ FTC press release (10 August 2012), ‘Facebook Must Obtain Consumers’ Consent Before Sharing Their Information Beyond Established Privacy Settings’, <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

⁹ *In the Matter of Facebook, Inc.*, (2016) (EPIC Request for Investigation, Injunction and Other Relief), <https://www.epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf>.

¹⁰ The Hamburg Commissioner for Data Protection and Freedom of Information, ‘Administrative Order against the mass synchronization of data between Facebook and WhatsApp’, Press Release 27.10.2016, available at <https://docmia.com/d/504564>.

¹¹ Garante per la protezione dei dati personali, ‘Il Garante privacy avvia istruttoria su WhatsApp’, Press Release 27.10.2016, <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/5460932>.

¹² Agencia Española de Protección de Datos, ‘La AEPD inicia actuaciones de investigación por la comunicación de datos entre Whatsapp y Facebook’, Press Release 5.10.2016, http://www.agpd.es/portalwebAGPD/revista_prensa/revista_prensa/2016/notas_prensa/news/2016_10_05-ides-idphp.php.

¹³ http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2016/20161027__letter_of_the_chair_of_the_art_29_wp_whatsapp_en.pdf.

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