

DATA PROTECTION ACT 1998
UNDERTAKING

Data Controller: WhatsApp Inc.
 1601 Willow Road
 Menlo Park
 California
 94025
 USA

WhatsApp Inc. hereby: notes the Information Commissioner's assessment of the relevant matters set out at paragraphs (1) – (13) below; notes the views expressed by the Information Commissioner at paragraphs (14) – (16) below; and acknowledges its voluntary public commitment, in the form of the undertaking set out at paragraph (17) below.

- (1) WhatsApp Inc. operates the WhatsApp Messenger service. This is a mobile messaging service for smartphones that has end-to-end encryption. The service uses the internet to send text messages, documents, images, video and audio messages between users.
- (2) In 2014, WhatsApp Inc. was acquired by Facebook, Inc. (a company incorporated in Delaware, USA).
- (3) The most recent version of WhatsApp's Privacy Policy prior to the acquisition of WhatsApp by Facebook was dated July 2012. This Privacy Policy did not expressly provide for WhatsApp to share with Facebook Inc. or other companies associated with Facebook Inc. (together "Facebook") any personal data that it held about its users.
- (4) On 25th August 2016, WhatsApp launched an updated version of its Terms of Service and its Privacy Policy.
- (5) The updated version of the Privacy Policy included the following text in relation to the sharing of personal data between WhatsApp Inc. and Facebook, Inc. or other companies

associated with Facebook, Inc. (the underlining is for emphasis and does not appear in the original).

We joined the Facebook family of companies in 2014. As part of the Facebook family of companies, WhatsApp receives information from, and shares information with, this family of companies. We may use the information we receive from them, and they may use the information we share with them, to help operate, provide, improve, understand, customize, support, and market our Services and their offerings. This includes helping to improve infrastructure and delivery systems, understanding how our Services or theirs are used, securing systems, and fighting spam, abuse, or infringement activities. Facebook and the other companies in the Facebook family may also use information from us to improve your experiences within their services such as making product suggestions (for example, of friends or connections, or of interesting content) and showing relevant offers and ads. However, your WhatsApp messages will not be shared onto Facebook for others to see. In fact, Facebook will not use your WhatsApp messages for any purpose other than to assist us in operating and providing our Services.

- (6) The passage set out above therefore indicated that WhatsApp planned to share UK users' personal data with "the Facebook family of companies" (i.e. companies in the Facebook group) for three purposes.

- (i) "The Service Analysis Purpose". This involves the use of personal data by WhatsApp and by the Facebook family of companies for the following:

to help operate, provide, improve, understand, customize, support, and market our Services and their offerings. This includes helping to improve infrastructure and delivery systems ...

Facebook have recently explained that WhatsApp has only shared personal data for the Service Analysis Purpose with Facebook as a data processor, only for the benefit of WhatsApp.

- (ii) “The System Security Purpose”. This involves the use of personal data by WhatsApp and the Facebook family of companies for:

...fighting spam, abuse, or infringement activities.

- (iii) “The Facebook Product and Advertising Purpose”. If an existing user did not elect their choice to opt-out, this involves WhatsApp sharing personal data with the Facebook family of companies:

to improve your experiences within their services such as making product suggestions (for example, of friends or connections, or of interesting content) and showing relevant offers and ads.

- (7) The Privacy Policy envisaged companies in the Facebook family with which the personal data of WhatsApp users was shared on a controller-to-controller basis for those purposes, using such data for their own business purposes and, when this sharing occurred, would therefore become data controllers in respect of such data. This is made clear by the text underlined at paragraph (5) above. This is notwithstanding the fact that WhatsApp also receives services from other Facebook companies acting as data processors on WhatsApp’s behalf (an ability which the Information Commissioner does not take any issue with, if done compliantly with data protection law).

- (8) In relation to *existing users*, WhatsApp notified those users about the updated Terms and Conditions and Privacy Policy when users launched the WhatsApp app. At this point the user viewed a notice limited to two pages. On the first screen, users were provided with: brief information; links to the Key Updates summary, Terms of Service, and Privacy Policy; and a button with the word “AGREE” on it. Users who chose not to click on the link to the Key Updates summary, were required to click the “AGREE” button in order to continue to use the WhatsApp service. On the second screen, existing users could read the Key Updates summary, Terms of Service, and Privacy Policy, and click a button with the word “AGREE” which users were required to click in order to continue to use the WhatsApp service.

- (9) The Key Updates summary included the following text:

WhatsApp is now part of the Facebook family of companies. Our Privacy Policy explains how we work together to improve our services and offerings, like fighting spam across apps, making product suggestions, and showing relevant offers and ads on Facebook. Nothing you share on WhatsApp including your messages, photos, and account information, will be shared onto Facebook or any of our other family of apps for others to see, and nothing you post on those apps will be shared on WhatsApp for others to see.

As well as:

The choices you have. If you are an existing user, you can choose not to have your WhatsApp account information shared with Facebook to improve your Facebook ads and products experiences. Existing users who accept our updated Terms and Privacy Policy will have an additional 30 days to make this choice by going to Settings > Account.

- (10) In relation to the sharing of personal data with companies within the Facebook family for the Facebook Product and Advertising Purpose, there was an ability for existing users to choose to opt-out of this, and also for them to choose to opt-out of this during a period of 30 days after they purportedly signified agreement to new Privacy Policy and Terms of Service. There was no similar facility in relation to the sharing of personal data with companies within the Facebook family for the Service Analysis Purpose or the System Security Purpose.
- (11) Save as set out above, if an existing user did not wish to agree to the new Privacy Policy and Terms of Service, then the only option for that user was to cease to use WhatsApp.
- (12) In relation to *new users*, after a new user downloaded WhatsApp, and before the new user could proceed with registration, the user was provided with the opportunity to review the Terms of Service and the Privacy Policy and given an option to click “Agree and Continue”. If the new user did not agree to the Terms of Service and the Privacy Policy then they were not able to use WhatsApp.

(13) By a letter dated 28th October 2016 to Steve Wood of the Information Commissioner's Office, Facebook Ireland Limited indicated that:

WhatsApp has not shared its EU users' personal data with Facebook for Facebook to use as a data controller for its own product and ad-related purposes.

In relation to the Facebook Product and Advertising Purpose, it stated that sharing for that purpose had been "paused". The letter therefore indicated that WhatsApp was not currently sharing UK user personal data with companies in the Facebook family so that those companies could use such data for the Facebook Product and Advertising Purpose for the benefit of their own businesses.

On 25th January 2018, there was a meeting of WhatsApp Ireland Limited (which is a new subsidiary of WhatsApp) and various companies in the Facebook group with the Article 29 Working Party. Following this meeting, WhatsApp Ireland Limited wrote to the Article 29 Working Party on 4th February 2018 to confirm what had been said in the meeting. In the letter WhatsApp confirmed the following:

- (i) There has been no sharing of personal data of its EU users (including UK users) on a controller-to-controller basis by WhatsApp with companies in the Facebook family, so that those companies could use the data for the Facebook Product and Advertising Purpose for the benefit of their own businesses.
- (ii) There has been no controller-to-controller sharing of personal data of its EU users (including UK users) by WhatsApp with companies in the Facebook family for the System Security Purpose. That is to say, WhatsApp has not shared any of its EU users' personal data on a controller-to-controller basis with companies in the Facebook family so that they could use such data for the System Security Purpose for the benefit of their own businesses. However, WhatsApp intends to share EU users' (including UK users') personal data with companies in the Facebook family on a controller-to-controller basis for the System Security Purpose in a manner which complies with the GDPR when it comes into effect in May 2018.

- (iii) There has been controller-to-processor but no controller-to-controller sharing of personal data of its EU users (including UK users) by WhatsApp with companies in the Facebook family for the Service Analysis Purpose. That is to say Facebook group companies have provided support to WhatsApp “*in areas such as infrastructure, analytics and monetisation*”, as a data processor and not to benefit its own business. This will continue.
- (iv) WhatsApp also worked with the Office of the Irish Data Protection Commissioner (“IDPC”) to agree and publish a list of Frequently Asked Questions for EU users in 2017, which remains published on WhatsApp’s website, and explains WhatsApp’s position in relation to this matter.

The Commissioner’s views

- (14) By DPA section 5(1)(b), the DPA applies to a data controller in respect of data where the data controller uses equipment in the UK for processing the data (otherwise than for the purposes of transit through the UK). In the present case, the Commissioner is of the view that the relevant data is processed by WhatsApp using equipment in the UK, that is to say, the smartphones of UK users who install and use the WhatsApp app. The Commissioner is of the view that WhatsApp’s processing of the personal data of UK users therefore comes within the DPA. The Commissioner acknowledges that WhatsApp contests the applicability of the DPA to it as well as the Commissioner’s interpretation of the scope of section 5(1)(b) thereof. The Commissioner acknowledges that this Undertaking is entered into by WhatsApp without prejudice to its position on applicable law and jurisdiction.
- (15) The Commissioner considers that, had WhatsApp proceeded to share EU users’ (including UK users’) personal data with the Facebook family of companies on a controller-to-controller basis so that those companies could use such data for the benefit of their own businesses, whether for the Service Analysis Purpose, the System Security Purpose, the Facebook Product and Advertising Purpose, or otherwise, that such sharing would have contravened DPP1 and DPP2.

(16) In summary, the Commissioner considers that WhatsApp would have been in breach of DPP1 and/or DPP2 had it shared any personal data with the Facebook family of companies on a controller-to-controller basis due to:

(i) WhatsApp not identifying a lawful basis of processing for any such sharing of personal data. Hence such sharing would have contravened DPP1.

(ii) WhatsApp failing to provide adequate fair processing information to users in relation to any such sharing of personal data. For this reason also, such sharing would have contravened DPP1.

(iii) In relation to existing users, such sharing would have involved the processing of personal data for a purpose that is incompatible with the purpose for which such data were obtained. This would have contravened DPP2.

(17) In order to provide reassurance to the public concerning any future sharing of data between WhatsApp and any company in the Facebook group on a controller-to-controller basis, WhatsApp Inc. and WhatsApp Ireland Limited (together “WhatsApp”) both give the following voluntary public commitment:

- a. **WhatsApp will not transfer any WhatsApp EU user data (including for UK users) to any other Facebook company on a controller-to-controller basis, for any purpose, prior to the General Data Protection Regulation (“GDPR”) coming into force on 25 May 2018;**
- b. **WhatsApp will only commence the sharing of WhatsApp EU user data (including for UK users) with any other Facebook company for safety and security purposes, or any other purposes, on a controller-to-controller basis after the GDPR comes into effect and in full compliance with the GDPR’s requirements, including concerning legal bases and the provision of information to users; and**

- c. in the event that WhatsApp plans to commence the sharing of WhatsApp EU user data (including for UK users) with Facebook companies on a controller-to-controller basis for the purposes of using this data to improve Facebook's products and advertising after the GDPR comes into force, it will only do so in accordance with the requirements of the GDPR, and working with its competent Lead Supervisory Authority under Art 56 of the GDPR.

Anne Hoge
General Counsel
For and on behalf of WhatsApp Inc.

Signed

Dated

Gareth Byrne
Associate General Counsel
For and on behalf of WhatsApp Ireland Limited

Signed

Dated

Elizabeth Denham
Information Commissioner

Signed



Dated 12 MARCH 2018