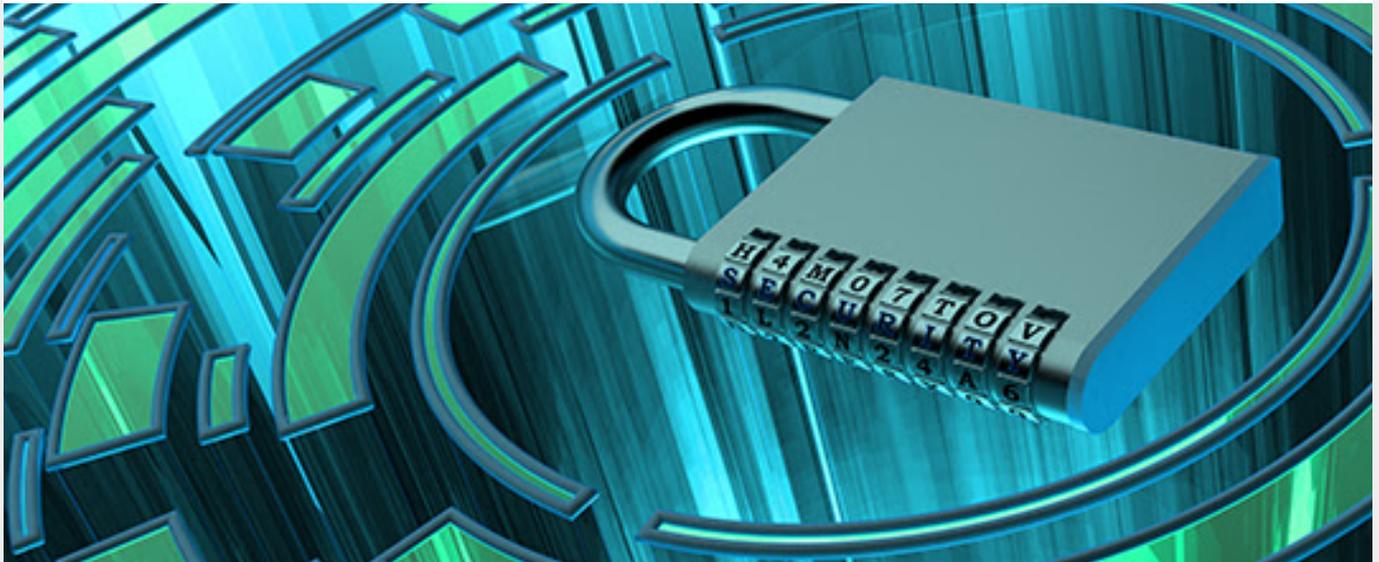


WhatsApp notifies Turkish Competition Authority that new conditions on user data sharing will not apply in Turkey

May 2021



Dear Clients, Colleagues and Friends,

On 21 May 2021, the Turkish Competition Authority announced that it had been notified by WhatsApp that its new terms of use, under which WhatsApp would have been able to share user data with other group entities, would not apply in Turkey, even for users who had already accepted the updated terms.

Following the release of the new terms of use by WhatsApp earlier this year, the Turkish Competition Board had initiated an *ex officio* investigation into Facebook and WhatsApp for abuse of dominant position on 11 January 2021. On the same date, the Competition Board had issued an interim decision under Article 9 of Law No. 4054 on the Protection of Competition, ordering WhatsApp to inform all its users in Turkey who had been notified the new terms of use that such terms would no longer apply as from 8 February 2021, pending the Competition Board's investigation.

The Competition Board's 11 January 2021 decision found that because Facebook holds significant market power in the consumer communications, social networking and online advertising services markets, the new terms of use, which would have allowed other group entities to receive and start processing user data collected on the WhatsApp application, may have exploitative and exclusionary effects within the meaning of competition law and cause irreparable harm.

The Competition Board noted that the WhatsApp application provides access to a variety of data on its users, such as message contents, location, profile photo and user group information, and that other information stored on users' devices or used in other applications installed on the device were also partially accessible. The Competition Board considered that making it a condition of use of the WhatsApp application to allow Facebook to use such data in other markets would result in (i) linking WhatsApp data to other Facebook company products and data, (ii) Facebook using its power in the consumer communication services market in a way that hinders the activities of its competitors in the online advertising market, and (iii) consumer exploitation as a result of excessive data collection and use of data for other services.

In parallel with the Competition Board's investigation, the Turkish Data Protection Authority announced on 12 January 2021 that the Data Protection Board was initiating its own investigation into the new terms of use published by WhatsApp under Law No. 6698 on the Protection of Personal Data. In particular, the Data

Protection Board noted that according to the Article 3 of said law, explicit consent to the processing of personal data must relate to a specific subject matter, be based on adequate information, and be freely given, in order to be valid. The Data Protection Board indicated that it would review whether explicit consent could be considered as given by users of their own freewill, and thus amount to valid consent, while acceptance of the new terms of use and privacy policy, including its data sharing features, was made a condition of use of the WhatsApp application.

The parallel investigations initiated by the Competition Board and the Data Protection Board are the clearest indication to date of how competition law and data protection law offer complementary tools to the regulators in order to impose constraints of the use of personal data by Big Data companies. It is unclear whether either authority will continue or put an end to their respective investigations following WhatsApp's announcement that the new terms of use would not apply in Turkey. Beyond the specific case at hand, it would certainly be useful for both regulators to shed a light on such important issues of competition and data protection law, in particular the extent of the conditions or restrictions companies may impose on the use of their services in exchange for access to their users' data.

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