

Competition Board imposes interim measure against WhatsApp's updated privacy policy

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Introduction

The Competition Board recently announced its decision⁽¹⁾ to launch a fully fledged investigation, *ex officio*, against Facebook Inc, Facebook Ireland Ltd, WhatsApp Inc and WhatsApp LLC (together, 'Facebook') in order to assess whether they had violated Article 6 of Law 4054 on the Protection of Competition. Moreover, the Competition Board imposed an interim measure against WhatsApp pursuant to Article 9 of Law 4054 after WhatsApp amended its terms of use and privacy policy to require its users to share data with other Facebook companies.⁽²⁾

Background information

In its decision, the Competition Board provided a general overview of the investigated parties and their practices before delving into a substantial assessment.

WhatsApp Inc was established in 2009 in the United States. It is available on smartphones and app stores globally, as a platform that provides instant messaging and voice and video calling services.⁽³⁾ At present, WhatsApp is offered to users free of charge without ads. In 2014 it was acquired by Facebook Inc,⁽⁴⁾ which has become one of the leading technology companies in the world since its establishment in the United States in 2004. In addition to WhatsApp, Facebook's portfolio holds other social media and messaging platforms, such as Instagram and Facebook Messenger.

Interim measure on consent procedures regarding data protection

On 11 January 2021 the Competition Board announced its decision to launch a fully fledged investigation against Facebook, together with the imposition of an interim measure against WhatsApp. The board's interest in the matter stems from the public outrage which arose after WhatsApp issued an update notice on 4 January 2021 pertaining to its privacy policy amendment, which required WhatsApp users to start sharing data with other Facebook companies as of 8 February 2021. In this regard, the Competition Board evaluated the competitive concerns that derived from WhatsApp's data-sharing policy under the Turkish competition law rules. The notice issued by WhatsApp to its users constitutes the basis of the Competition Board's decision, as the board acted in a swift manner to dispel the public alarm regarding the use of private data by Facebook.

Initially, the Competition Board evaluated the competition law concerns which arose due to the newly amended obligations for WhatsApp users to share their data with other Facebook companies. The board assessed the extent of the data which WhatsApp can obtain and the significance of such data. On assessment, the Competition Board stated that WhatsApp could access users':

- message contents;
- location information;
- profile photographs;
- data on group chats (ie, correspondence between more than two people); and
- other data stored on their handheld devices.

Moreover, the Competition Board noted the concern that the scope of the information collected by WhatsApp was not limited to correspondence, contact lists and photographs as the data used by other apps installed on users' devices may also be partially accessible. The board further stated that the obligations imposed on users

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were not fully explained in the notice. As the new amendments to the terms of use and the privacy policy required WhatsApp users to share data with other Facebook companies, the board emphasised the fact that the data shared through WhatsApp should be considered 'more confidential' compared with data shared through any social media platform. The board added that such data may contain more private information or trade secrets and be "information which WhatsApp users would not want to share with the public, unlike Facebook where data is shared with all members of a closed group". Consequently, the Competition Board expressed its competition law concerns relating to:

- the possibility of linking WhatsApp data to other Facebook company products and data;
- the possibility of Facebook using its power in the consumer communication services market in such a way that it would hinder its competitors in the online advertising market; and
- the risk of consumer exploitation as a result of excessive data collection and the use of such data for other services.

Subsequently, the decision considered:

- the platforms provided by Facebook and the services offered to users by Facebook;
- the number of active users of WhatsApp; and
- the ownership of the platforms.

The Competition Board's assessment of competition concerns was based on Facebook's share in the markets for:

- consumer communication;
- social network services; and
- online advertising services.

The Competition Board stated that other Facebook companies would be able to access and use WhatsApp users' data if these users accepted the amended terms of use and privacy policy issued by Facebook. In this respect, the board concluded that if it were to cancel Facebook's newly issued terms of use and privacy policy at the end of a fully fledged investigation, it would be difficult to eliminate the advantages that other Facebook companies would have already benefited from through the use of the data. Therefore, implementation of the new privacy policy would create a situation that could not be rectified, unless an interim measure were to be implemented. Moreover, considering Facebook's power in the abovementioned markets, the board stated that it was likely that the newly adopted privacy policy, which required WhatsApp users to share their data with other Facebook companies, could cause serious and irreparable damages before a final decision could be rendered at the end of the fully fledged investigation. Thus, the Competition Board proceeded to implement an interim measure against WhatsApp.

The interim measure suspends the implementation of WhatsApp's amended privacy policy and requires WhatsApp to announce the suspension to all WhatsApp users who may have accepted the amended privacy policy when they received the notice, as well as those who refrained from accepting it.

Comment

This decision is important as it is the first example in which the Competition Board has taken a dive into the interface between data protection and competition law. Another notable point is that the board assumed jurisdiction over the matter at breakneck speed – in only two days – and in a determined manner, which is also unusual considering the board's practice so far. This mainly stems from the fact that WhatsApp's amendment regarding its terms of use and privacy is far from trivial. Rather, it can be considered a milestone which led the Competition Board to take swift action to appease the concerns regarding the collection and use of the public's personal data.

For further information on this topic please contact [Gönenç Gürkaynak](#), [Eda Duru](#), [Betül Baş Çömlekçi](#) or [Uygar Yetkiner](#) at ELIG Gürkaynak Attorneys-at-Law by telephone (+90 212 327 17 24) or email (gonenc.gurkaynak@elig.com, eda.duru@elig.com, betul.bas@elig.com or uygar.yetkiner@elig.com). The ELIG Gürkaynak Attorneys-at-Law website can be accessed at www.elig.com.

Endnotes

- (1) Decision 21-02/25-M, 11 January 2021. The announcement of the interim measure is available [here](#).
- (2) Decision 21-02/25-10, 11 January 2021.
- (3) Further information is available [here](#).

(4) At the time, based on the turnover figures of the transaction parties, the applicable jurisdictional turnover thresholds under Article 7 of Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board had not been exceeded and thus the transaction did not require a mandatory merger control filing before the Turkish Competition Authority. The European Commission's approval decision on the transaction is available [here](#) (COMP/M.7217, Facebook/WhatsApp (2014)).

Esma Aktaş assisted in the preparation of this article.

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