

What's up with WhatsApp?

An assessment of WhatsApp's practices in the light of EU consumer protection rules

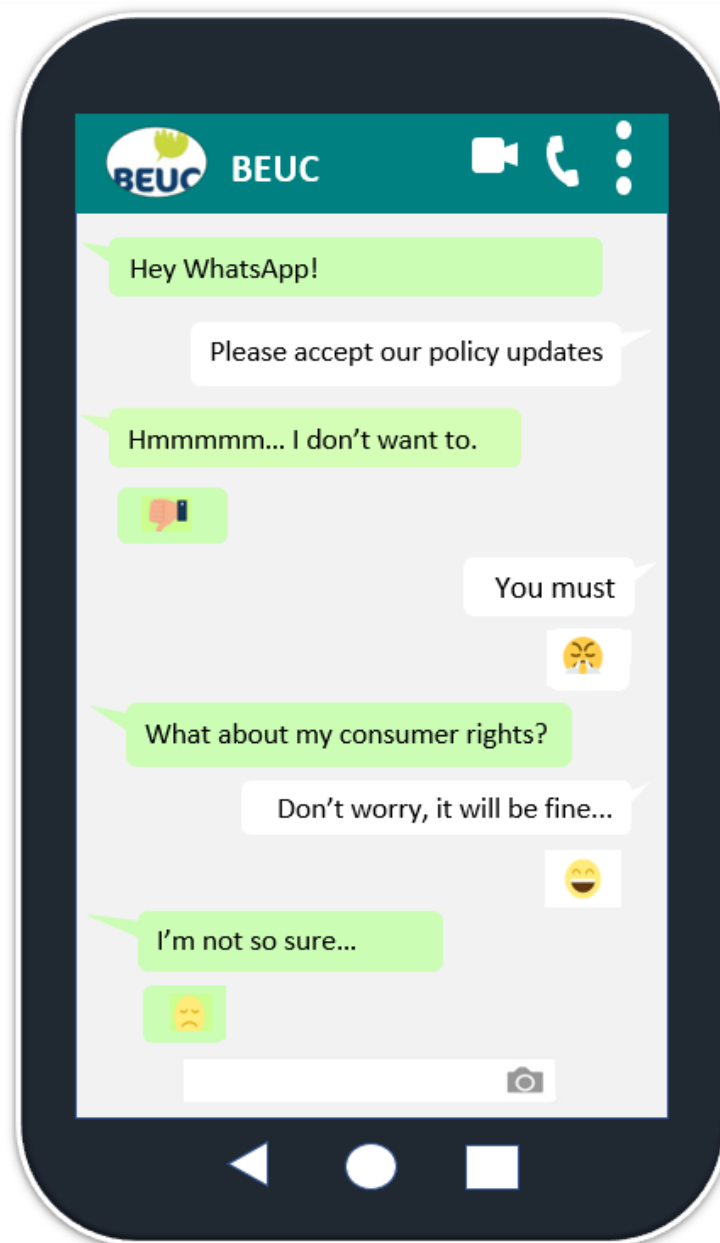


Table of contents

What this complaint is about.....3

The context4

- Relationships between WhatsApp and Facebook: always closer, always blurrier.....4
- The 2021 changes in WhatsApp’s policies5

Problem #1 WhatsApp’s aggressive practices.....6

- What are the facts?.....6
- What are the relevant legal grounds?8
- Application to WhatsApp’s practices.....8

Problem #2 Unclear and misleading changes in WhatsApp’s policies....12

- What are the facts?.....12
- What are the relevant legal grounds?13
- Application to WhatsApp’s practices.....14

Annex 1: Presentation of the changes in WhatsApp’s FAQ.....18

Annex 2: Text of the notifications.....20

Annex 3: Non-exhaustive list showing the recurrence of the notifications received by a WhatsApp user between end of May and early July 2021.....21

What this complaint is about

On 12 July 2021, BEUC and eight of its member organisations¹ submitted an external alert to the European Commission and the network of European consumer authorities (“CPC-network”) to report on several aggressive and misleading commercial practices by the messaging app WhatsApp, in accordance with EU Regulation 2017/2394 of 12 December 2017 (“CPC Regulation”).

According to our analysis, these practices constitute a widespread infringement with a Union dimension of several EU consumer laws.

Our complaint is based on EU consumer protection law only. However, it seems highly likely that the practices of WhatsApp are not compliant with the EU General Data Protection Regulation (GDPR) neither. Therefore, we consider that the fact that the Hamburg data protection Commissioner found these practices and policies to be in breach of the GDPR² to be a relevant additional element for authorities when assessing the lawfulness of WhatsApp’s commercial practices under consumer law.

¹APC (Romania), Consumentenbond (The Netherlands), dTest (Czech Republic), Forbrukerrådet (Norway), KEPKA (Greece), EKPIZO (Greece), S.O.S. Poprad (Slovakia) and UFC-Que choisir (France).

² <https://datenschutz-hamburg.de/assets/pdf/2021-05-11-press-release-facebook.pdf> (last access: July 2021).

The context

WhatsApp was launched in 2009 as a messaging app providing an alternative to SMS. It is today available in more than 180 countries and in 60 different languages.

With more than two billion active users, over five billion downloads, and more than 100 billion messages sent every day, WhatsApp has become the world's most popular messaging app.³ It counts several million users in Europe, including approximately 48m in Germany, 35m in Italy, 33m in Spain, 30m in the United Kingdom,⁴ 21m in France,⁵ 12.4m in the Netherlands or 4.8m in Romania⁶.

Over the years, WhatsApp has proposed new functionalities, such as voice calling, video calling or group calls. It has also facilitated interactions between users and businesses. In early 2018, WhatsApp launched "WhatsApp Business" to facilitate contacts between businesses and their customers, and to enable them to showcase their products. Recently, WhatsApp announced its intent to become a key app for online shopping,⁷ and highlighted its objective to "build new ways to chat or shop with a business".⁸

As the Head of WhatsApp at Facebook Will Cathcart wrote on Twitter in January 2021:⁹

"Not everyone may realise how common it is to WhatsApp message businesses in many countries. In fact, about 175 million people message a business account each day on WhatsApp and more want to do so".¹⁰

- Relationships between WhatsApp and Facebook: always closer, always blurrier

Facebook bought WhatsApp in 2014 for an amount of \$19bn.¹¹

In a blogpost written at that time, WhatsApp CEO Jan Koum announced that "WhatsApp will remain autonomous and operate independently".¹² He added "there would have been no partnership between our two companies if we had to compromise on the core principles that will always define our company, our vision and our product." Facebook CEO Mark Zuckerberg commented that "we are absolutely not going to change plans around

³ <https://www.oberlo.com/blog/whatsapp-statistics> (last access: July 2021)

⁴ www.businessofapps.com/data/whatsapp-statistics/ (last access: July 2021)

⁵ www.statista.com/forecasts/1146665/whatsapp-users-in-france (last access: July 2021).

⁶ www.statista.com/forecasts/1145862/whatsapp-users-in-romania (Last access: July 2021).

⁷ Payment via WhatsApp is already possible in certain countries (see: www.whatsapp.com/security/, last access: July 2021).

⁸ <https://blog.whatsapp.com/shopping-payments-and-customer-service-on-whatsapp/?lang=en> (last access July 2021)

⁹ <https://twitter.com/wcathcart/status/1347660772483104769>, www.techadvisor.com/news/social-networks/whatsapp-facebook-data-sharing-3800374/ (last access: July 2021)

¹⁰ <https://twitter.com/wcathcart/status/1347660772483104769>, (last access: July 2021)

¹¹ The European Commission cleared the merger in 2014 (https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf).

¹² <https://blog.whatsapp.com/facebook> (last access: July 2021).

WhatsApp and the way it uses user data. WhatsApp is going to operate completely autonomously”.¹³

Despite these early announcements, the alleged separation between WhatsApp and Facebook has become more and more porous over the years. Exchanges between the two companies have multiplied as Facebook has been seeking ways to maximise revenues from its acquisition. From time-to-time, Facebook has been amending WhatsApp policies to progressively facilitate the sharing of data between the two companies. In 2016, WhatsApp’s policy changes raised many concerns worldwide. When Facebook notified the EU of its acquisition of WhatsApp in 2014, it told the European Commission that it would not be able to match users accounts on the two platforms. However, a few months later, this is exactly what Facebook did. Consequently, in 2017, the European Commission fined Facebook €110m for providing misleading information about the 2014 WhatsApp takeover.¹⁴ Furthermore, back in 2016, users still had (for a short period of time) the possibility to opt out of sharing certain data with Facebook. However, this possibility was not clearly indicated to them,¹⁵ and was finally entirely removed in 2016.¹⁶ This means that WhatsApp users who did not opt out in 2016 and those who signed up since 2016 share information (e.g. their phone numbers) with Facebook.

Back in 2016, WhatsApp explained the increased coordination between WhatsApp and Facebook as follows:¹⁷

“By coordinating more with Facebook, we’ll be able to do things like track basic metrics about how often people use our services and better fight spam on WhatsApp. And by connecting your phone number with Facebook’s systems, Facebook can offer better friend suggestions and show you more relevant ads if you have an account with them”.

- **The 2021 changes in WhatsApp’s policies**

In January 2021, WhatsApp announced changes in its privacy policy and terms of service. Once again, this sparked worldwide criticisms and concerns, which forced Facebook and WhatsApp to re-think the whole process and to delay it for a few months.¹⁸ Finally, WhatsApp’s policy changes came into effect on 15 May 2021, globally but with some local differences.

¹³www.forbes.com/sites/parmyolson/2014/04/10/regulators-to-facebook-and-whatsapp-were-watching-you/?sh=7eae15017d0c (last access July 2021)

¹⁴www.theguardian.com/business/2017/may/18/facebook-fined-eu-whatsapp-european-commission; https://ec.europa.eu/commission/presscorner/detail/pl/IP_17_1369 (last access July 2021).

¹⁵ www.makeuseof.com/tag/how-to-stop-whatsapp-handing-your-info-to-facebook/ (last access July 2021).

¹⁶ The Wired, “WhatsApp Has Shared Your Data with Facebook for Years, Actually”, January 2021, www.wired.com/story/whatsapp-facebook-data-share-notification/ (last access: June 2021) (the following passage was deleted from the privacy policy: “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”). This means that, in practice, users can no longer object to the sharing of data with FB.

¹⁷ <https://blog.whatsapp.com/?page=5> (last access July 2021).

¹⁸ Burcu Kilic and Sophia Crabbe-Field, “You should be worried about how much info WhatsApp shares with Facebook”, *The Guardian*, 14 May 2021 (www.theguardian.com/commentisfree/2021/may/14/you-should-be-worried-about-how-much-info-whatsapp-shares-with-facebook (last access July 2021)).

Annex 1 shows how WhatsApp has explained the main changes in its policies.¹⁹ Among other things, WhatsApp has highlighted that there has been no change in the way it shares data with its parent company Facebook. As WhatsApp states, “we will not expand WhatsApp’s ability to share user data with its parent company Facebook users”. In addition, WhatsApp has been seeking to reassure its users by stating that their private discussions with (e.g.) friends and relatives will remain fully encrypted from end-to-end. However, as further explained below, there are still important changes for users, and they are particularly relevant when users decide to engage with businesses. On this part, WhatsApp has failed to provide clear explanations about what the changes in the terms of service and privacy policy actually mean for users.

Finally, although the changes may for now be limited to user-to-business discussions, one may not rule out the possibility that Facebook will soon decide to make the same policy applicable for all messages.²⁰ Experience has shown that this would not be the first time that Facebook breaks a promise.

Problem #1. WhatsApp’s aggressive practices

- **What are the facts?**

WhatsApp has been prompting its users to accept its policy changes through persistent notifications (*Annex 2 and 3*) displaying the following statement:

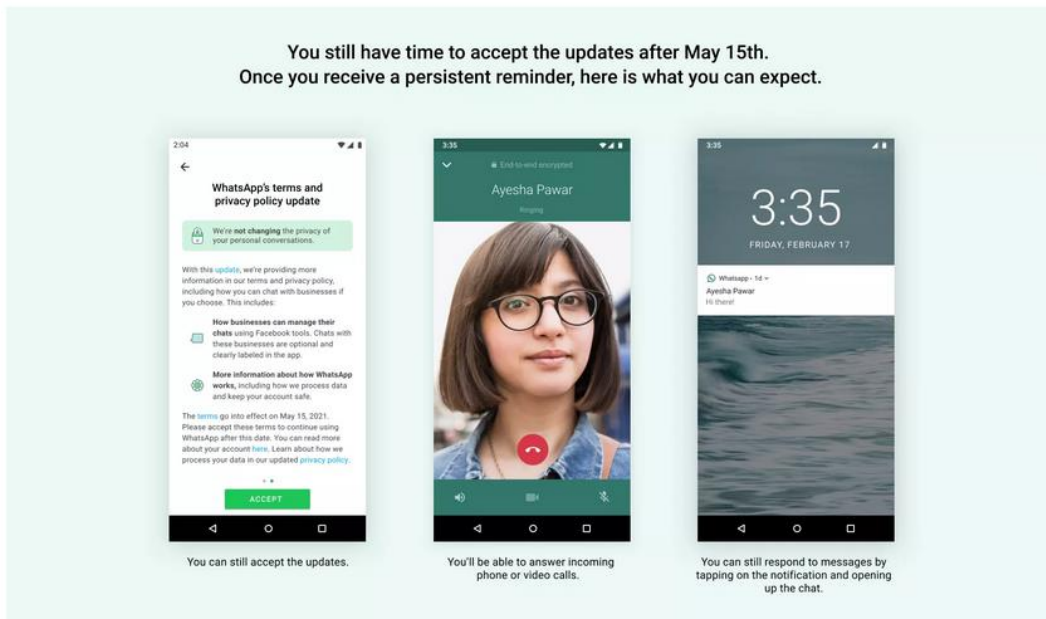
“The terms go into effect on 15 May 2021. Please accept these terms to continue using WhatsApp after this date.”

Initially, WhatsApp announced that users who do not accept the policy changes would lose access to their chats and other functions after a certain period of time. The exact timing of the functionality exclusion was said to vary from user to user.²¹ On its FAQ webpage, WhatsApp explained the consequences of not accepting the policy updates as follows:

¹⁹ <https://faq.whatsapp.com/general/were-updating-our-terms-and-privacy-policy-eea/?lang=en> (last access: July 2021).

²⁰ As an Advisor for Internet Trust at Internet Society explained, “again, even if users believe that is safe, or that it doesn’t apply to them, they may be looking down the road to the inevitable next steps from Facebook; switching from this being opt-in to opt-out, and extending the policy from B2C to all messages. There’s also the point that Facebook can intrude significantly on privacy without needing to read the contents of WhatsApp messages by mapping and monetising an individual’s social graph” (quoted in www.techadvisor.com/news/social-networks/whatsapp-facebook-data-sharing-3800374/, last access: July 2021).

²¹ <https://faq.whatsapp.com/general/security-and-privacy/what-happens-when-our-terms-and-privacy-policy-updates-take-effect> (consulted on 2 June 2021).



In early June 2021, after a lot of criticism, WhatsApp finally announced in its FAQ that it had changed its approach: users who do not accept the policy updates will not experience limited functionalities on the app. WhatsApp also stated it “currently” had no plans for the reminders to become persistent. The updated FAQ displayed the following text:²²

“Considering the majority of users who have seen the update have accepted, we’ll continue to display a notification in WhatsApp providing more information about the update and reminding those who haven’t had a chance to do so to review and accept. We currently have no plans for these reminders to become persistent and to limit the functionality of the app.”

Nevertheless, at the time of writing this report (i.e., July 2021), **WhatsApp continues to send persistent notifications prompting users to accept the updated terms and privacy policy.** Since the beginning, these notifications have relentlessly put users under the same pressure:

“The terms go into effect on 15 May 2021. Please accept these terms to continue using WhatsApp after this date.”

²² <https://faq.whatsapp.com/general/security-and-privacy/what-happens-when-our-terms-and-privacy-policy-updates-take-effect/?lang=en> (last access July 2021)

- What are the relevant legal grounds?

Article 8 of the Unfair Commercial Practices Directive (UCPD):²³ “A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise”.

Article 9 of the UCPD: “In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:

- (a) its timing, location, nature or persistence;
- (b) the use of threatening or abusive language or behaviour;
- (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;
- (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;
- (e) any threat to take any action that cannot legally be taken”.

Point 26 of the UCPD Annex: “Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law (...)”.

Point 24 of the UCPD Annex: “Creating the impression that the consumer cannot leave the premises until a contract is formed”.

- Application to WhatsApp’s practices

➤ *The use of undue influence*

The UCPD Guidance provides that an “aggressive practice should entail active conduct by the trader (harassment, coercion or undue influence) which limits consumers’ freedom of choice”.²⁴

WhatsApp has been sending recurrent notifications to its users urging them to agree with the new terms to continue using the service. The way notifications have been worded and the message that they convey clearly infer that those users may lose access to the platform (or to some functionalities of the service) if they do not agree with the policy

²³ EU Directive 2005/29/EC of 11 May 2005 (the Unfair Commercial Practices Directive).

²⁴ SWD/2016/0163 final, 25 May 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163>

updates. This was confirmed by the earlier version of the FAQ, and also widely reported in the media:

“Instead of a hard cut-off, the messaging app will gradually degrade and eventually cease to function if you don’t accept the changes.”

Wired, 15 May 2021²⁵

“WhatsApp users who don't accept the new terms after May 15 will eventually encounter "limited functionality" on the app until the updated terms are accepted”.

Zd Net, 12 May 2021²⁶

“A partir du 15 mai, les utilisateurs qui n’acceptent pas cette mise à jour subiront une utilisation dégradée de l’application de messagerie” [*From 15 May, users who do not accept this update will experience a downgraded messaging app experience*]

Le Monde, 12 May 2021²⁷

Announcing that users may lose access to the service or experience limited functionalities is comparable to psychological blackmail and should be viewed as the digital version of aggressive practice prohibited under Point 24 of the UCPD Annex (“creating the impression that the consumer cannot leave the premises until a contract is formed”). Although, in theory, users could decide to turn to other messaging apps, quitting WhatsApp would be at the expense of losing most of their contacts. For many people, leaving WhatsApp is not an option because of the strong network effects and the lack of interoperability with other messaging services. For many, WhatsApp is the main channel for staying in touch with family and friends.

In early June 2021, WhatsApp announced in its FAQ that it had currently “no plans for these reminders to become persistent and to limit the functionality of the app”. The reason for this change, WhatsApp explained, was that “the majority of users who have seen the update have accepted”. In other words, **this means that the majority of users who accepted the policy updates did so under the coercion that they would have faced limited functionalities otherwise.**

In addition, as several screenshots taken between May and July 2021 show (and thus including after WhatsApp’s change in its FAQ) the message conveyed in the notifications has remained the same and continues to read as follows: “the terms go into effect on 15 May 2021. Please accept these terms to continue using WhatsApp after this date”. **There is therefore a contradiction between what WhatsApp states in its amended FAQ and the message that it continues to convey to its users in the notifications. This is all the more worrying considering that the majority of users will only read the text of the notification appearing on their screens without taking the time to consult the FAQ in parallel.**

²⁵ www.wired.com/story/whatsapp-privacy-policy-facebook-data-sharing/, 15 May 2021 (last access: July 2021)

²⁶ www.zdnet.com/article/whatsapp-this-is-what-happens-if-you-dont-accept-our-new-privacy-terms/, 12 May 2021 (last access: July 2021).

²⁷ www.lemonde.fr/pixels/article/2021/05/12/ce-que-la-nouvelle-politique-de-confidentialite-de-whatsapp-va-changer-et-ce-qui-arrivera-si-vous-la-refusez_6080031_4408996.html, 12 May 2021 (last access: July 2021)

To sum up:

- **In early June 2021, WhatsApp announced that the “majority of users who have seen the update have accepted”. This means that most of WhatsApp’s users had accepted the policy updates under the threat of experiencing limited functionalities. Ultimately, WhatsApp announced a change in its FAQ once it had a large number of users who had bought in into the changes.**
- **Then, WhatsApp announced in its FAQ it had no plans to limit the functionalities but the message appearing in the notifications has continued to be the same. It still provides that users must accept the updates to continue using the service by 15 May 2021. In addition, WhatsApp claimed that the notifications will not be persistent, although they have been recurrent in practice.**
- **Finally, WhatsApp’s notifications continue to say, “accept by 15 May [2021] for continuing using the service”, but as of 8 July 2021, the date upon which this report was finalised, the platform is fully operational even for those users who have not agreed with the policy updates. In other words, WhatsApp continues to trick people into accepting the policy updates with the fear that they might lose access to the service.**

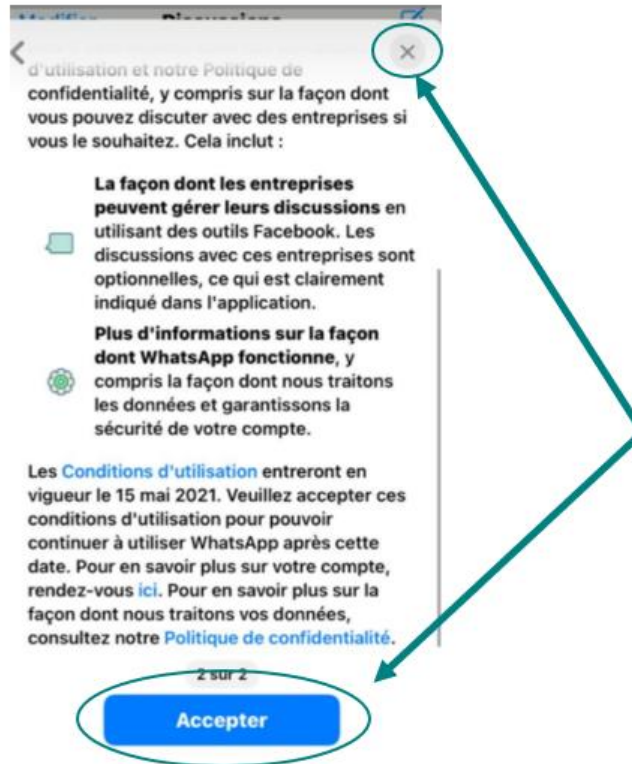
➤ ***The nature, location, timing, and persistence of the notifications***

◦ ***The nature of the notifications***

The UCPD Guidelines stress that the prohibition of practices under Point 26 of the UCPD “aims to protect consumers against pestering by distance marketing tools”.

However, this is what WhatsApp has been doing constantly.

Users cannot use the service before either accepting the new terms by clicking on a big “accept” button or closing the notification window by clicking on a hardly visible tiny grey icon placed in the right corner of their screen.



The design of the notification does not provide for a “no option”. This means that users have no possibility to turn off the notifications and that WhatsApp will keep bothering them until they accept the policy updates. Similar practices of “no no option” have been reported as **dark patterns** as they intend to push users into a certain direction and unduly limit their freedom of choice.²⁸

- *Their timing & location*

WhatsApp sends the notifications in a “pop up” window appearing on users’ screens when they open the app, which means in practice when they are about to answer or make phone calls or when receiving/sending messages. In these circumstances, users will most of the time simply agree with the update in order to quickly access the service to read or send a message or call somebody.

- *Their persistence*

Finally, although WhatsApp announced that it had “currently” no intent to make the notifications persistent, **it continues to send notifications very frequently, often on a daily basis.** A consumer reported to us that she received notifications (inter alia) on 21, 27 May, 4, 7, 8, 9, 11, 12, 13, 14, 16, 19, 20, 21, 22, 23, 24,25, 28, 29, 30 June, 1, 2, 4, 5, 6, 7 and 8 July 2021 (Annex 3).²⁹

²⁸ <https://darkpatterns.uxp2.com/pattern/instagram-no-option-for-no/> (see in particular Instagram’s “no option for no”) (last access: July 2021)

²⁹ The notification received on 8 July 2021 was the last one to be included as the report was finalised on that same day.

To sum up: the content of the notifications, their nature, their timing and their recurrence put undue pressure on users and unfairly impair their freedom of choice. Such a practice is prohibited under Articles 8 and 9 of the UCDP.

Problem #2 Unclear and misleading changes in WhatsApp's policies

- **What are the facts?**

In January 2021, a WhatsApp spokesperson announced:³⁰

"There are no changes to WhatsApp's data-sharing practices in the European region arising from the updated terms of service and privacy policy. For the avoidance of any doubt, it is still the case that WhatsApp does not share European region WhatsApp user data with Facebook for the purpose of Facebook using this data to improve its products or advertisements."

In a series of tweets, WhatsApp's Director of policy for Europe, Niamh Sweeney added:

"The latest update to our Privacy Policy is about providing clearer, more detailed information to our users on how and why we use data. It's also about improving how businesses use WhatsApp to connect with customers. The updated policy provides info on how businesses using the WhatsApp API to talk to customers can now do so using a Facebook-provided service to help them manage their chats with customers".³¹

In its FAQ and documentation, WhatsApp further highlighted:

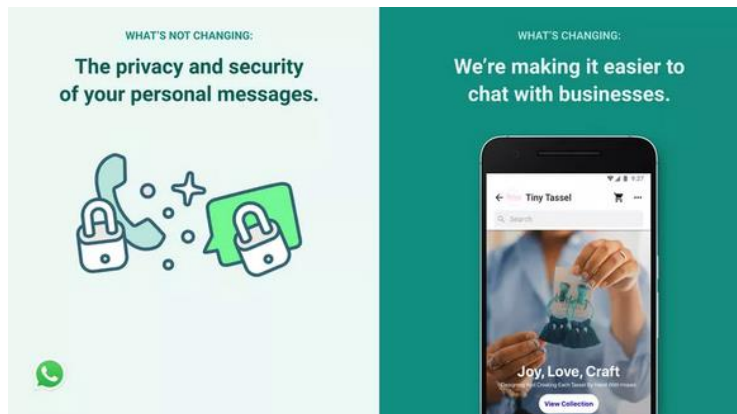
"The changes are related to optional business features on WhatsApp and provides further transparency about how we collect and use data".

And:

"We have added more detail to certain sections of our privacy policy and added new sections. We have also simplified the layout of the privacy policy and made it easier to navigate" (Annex 1).

³⁰ www.irishtimes.com/business/technology/whatsapp-says-european-users-do-not-have-to-share-data-with-facebook-1.4452435 (last access: July 2021)

³¹ <https://twitter.com/NiamhSweeneyNYC/status/1347185269435469826> (last access: July 2021).



Source: WhatsApp FAQ (June 2021)³²

However, the concrete nature of the policy changes and their implications for users remain far from clear.

- What are the relevant legal grounds?

Article 5 of the Unfair Contract Terms Directive (UCTD):³³ “In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail (...).”

In the UCTD Guidance, the European Commission highlighted that, among the criteria to be considered when assessing the potential unfairness of a term, is “the comprehensibility of the individual terms, in light of the clarity of their wording and the specificity of the terminology used, as well as, where relevant, in conjunction with other contract terms”.³⁴

Article 5 of the UCPD: “A commercial practice shall be unfair if (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers”.

Article 6 of the UCPD: “A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise: (...)

b) the main characteristics of the product (...);

³² <https://faq.whatsapp.com/general/security-and-privacy/about-new-business-features-and-whatsapps-privacy-policy-update> (last access in July 2021).

³³ EU Directive 1993/13/EEC of 5 April 1993 (the Unfair Contract Terms Directive)

³⁴ 2019/C 323/04, 27.09.2019, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.323.01.0004.01.ENG&toc=OJ:C:2019:323:TOC (last access: July 2021).

c) the extent of the trader's commitments, the motives for the commercial practice (...)"

- Application to WhatsApp's practices
 - *WhatsApp does not explain in plain and intelligible language the nature of the changes and their consequences for users*

WhatsApp has argued that the policy changes do not modify the existing sharing of data with Facebook, which has been in place since 2016. However, when looking more closely, the reality appears more complex.

As explained earlier, WhatsApp pretends that the key objective of the changes for which it seeks users' acceptance is to make it easier for them to engage with businesses via the app. While doing so, WhatsApp and Facebook are laying the ground for massive data-transfers between the two companies and the monetisation of the activity of WhatsApp users, notably through marketing and advertising. This is however done in an obscure way and is not intelligible for WhatsApp users. In its communication, WhatsApp misleads users as to the true nature and objective of the policy changes, claiming that these serve to provide more detailed information to users.

WhatsApp's FAQ highlights:³⁵

"Facebook hosting services: Messaging with businesses is different than messaging with your family or friends. Some large businesses need to use hosting services to manage their communication. Which is why we're giving businesses the option to use secure hosting services from Facebook to manage WhatsApp chats with their customers, answer questions, and send helpful information like purchase receipts. But whether you communicate with a business by phone, email, or WhatsApp, it can see what you're saying and may use that information for its own marketing purposes, which may include advertising on Facebook. To make sure you're informed, we clearly label conversations with businesses that are choosing to use hosting services from Facebook.

WhatsApp's Help Centre stresses:³⁶

"Shopping experiences: more people are shopping online, increasing as we are apart. Where available, businesses with a Shop on Facebook or Instagram can already have Shops on the WhatsApp business's profile. This allows you to see a business's products on Facebook and Instagram and shop from it directly in WhatsApp. If you choose to interact with Shops, we will let you know in WhatsApp how your data is being shared with Facebook".

This means that when users talk to businesses on WhatsApp, their data is also being transferred to businesses and Facebook. Yet WhatsApp does not provide clear information on the way the data is being shared with these third parties (and Facebook) when users interact with businesses via WhatsApp.

³⁵ <https://faq.whatsapp.com/general/security-and-privacy/answering-your-questions-about-whatsapps-privacy-policy/?lang=en> (last access: July 2021).

³⁶ <https://faq.whatsapp.com/general/security-and-privacy/about-new-business-features-and-whatsapps-privacy-policy-update/?lang=fr> (last access: July 2021).

WhatsApp argues:

“The changes to our Privacy Policy provide you with more detail on how we manage your information. We have added more detail to certain sections of our Privacy Policy and added new sections. We have also simplified the layout of the Privacy Policy and made it easier for users to navigate” (see Annex 1).

Yet WhatsApp remains very vague about the sections it has removed and the ones it has added. It is up to users to seek out this information by themselves. Ultimately, it is almost impossible for users to clearly understand what is new and what has been amended. The opacity of the new policies is in breach of Article 5 of the UCTD and is also a misleading and unfair practice prohibited under Article 5 and 6 of the UCPD.

➤ *Concerns about the unclarity and unfairness of the new policies are reinforced by GDPR infringements*

There is a lot of uncertainty and concerns about WhatsApp’s policy changes and what they entail for users. On 11 May 2021, The Hamburg Commissioner for Data Protection and Freedom of Information (*Hamburgische Beauftragte für Datenschutz und Informationsfreiheit - HmbBfDI*) issued an order prohibiting Facebook from processing personal data from WhatsApp for its own purposes³⁷. This was done under the urgency procedure of the GDPR,³⁸ which provides Data Protection Authorities (DPAs) with the powers to adopt provisional measures for a specified period of time in their territory, in this case Germany since the HmbBfDI is the DPA responsible for overseeing Facebook in this country.³⁹

In particular, the HmbBfDI highlighted:

“The provisions on data transfers are scattered at different levels of the privacy policy, they are unclear and hard to distinguish in their European and international versions. In addition, the contents are misleading and show considerable contradictions. Even after close analysis, it is not clear what consequences approval has for users. Furthermore, consent is not freely given, since WhatsApp demands acceptance of the new provisions as a condition for the continued use of the service's functionalities”.⁴⁰

The validity of the HmbBfDI order is limited to three months under the GDPR urgency procedure. The HmbBfDI has announced that it is bringing this matter to the attention of the European Data Protection Board (EDPB) in order to facilitate a binding decision at the

³⁷ <https://datenschutz-hamburg.de/assets/pdf/2021-05-11-press-release-facebook.pdf> (last access: July 2021).

³⁸ Article 66 GDPR.

³⁹ This is because the Hamburg DPA is in charge of the domestic oversight of Facebook under Germany's federal rules as its country office is based in Hamburg.

⁴⁰ The Hamburg DPA also highlighted “against this background, there is no basis for processing of personal data of WhatsApp users by Facebook for their own purpose. In particular, Facebook cannot claim a prevailing legitimate interest in processing the data of WhatsApp users because their interests are overridden by the rights and freedoms of the data subjects. Consent is neither given freely nor in an informed manner. This applies particularly to minors. For these reasons, consent under data protection law cannot be considered as a legal ground. The processing of WhatsApp users' data is also not necessary for Facebook to perform a contract”.

European level. At the time of submitting this external alert, the decision of the EDPB has not been announced yet.

A few months earlier, in January 2021, the Italian Data Protection Authority (*Garante per la protezione dei dati personali*) already issued a statement⁴¹ highlighting that WhatsApp's policy updates were not sufficiently clear as they did not enable users to fully understand the nature of the data processing activities.⁴²

In the UCPD guidance, the European Commission highlights:⁴³

"However, such data protection violations should be considered when assessing the overall unfairness of commercial practices under the UCPD, particularly in the situation where the trader processes consumer data in violation of data protection requirements, i.e., for direct marketing purposes or any other commercial purposes like profiling, personal pricing or big data applications.

From a UCPD perspective, the first issue to be considered concerns the transparency of the commercial practice".

Whereas the opacity of WhatsApp's practices may as such already constitute a prohibited misleading practice under the UCPD, this is all the more aggravated by the fact that WhatsApp has been putting pressure on its users to accept policy changes which, ultimately, may not be GDPR compliant.

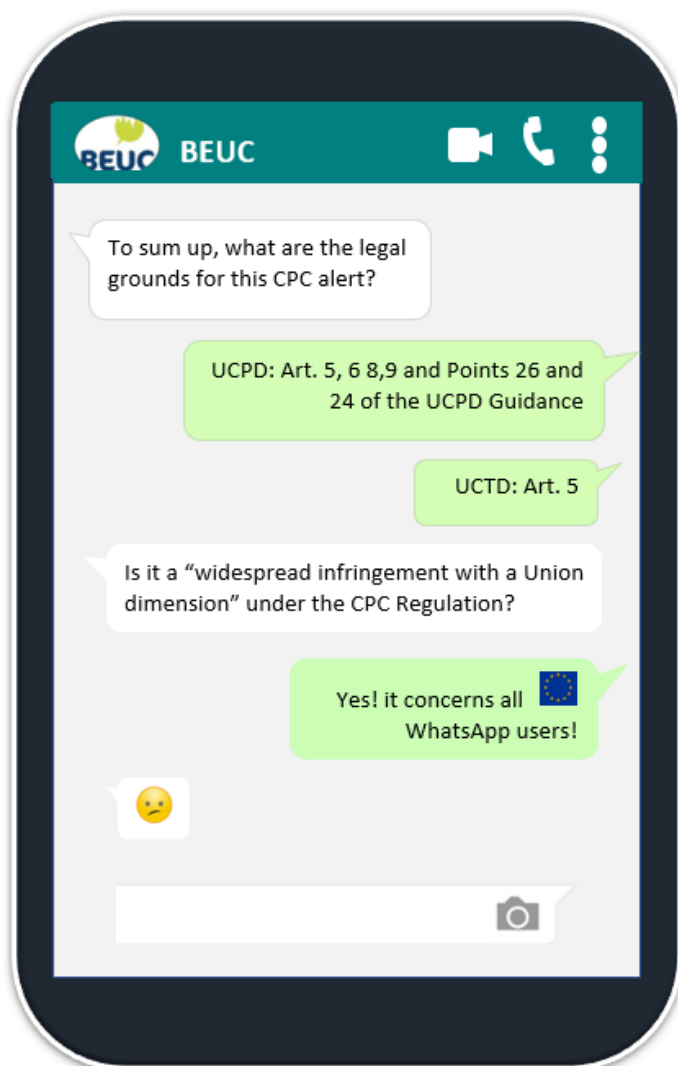
Pushing consumers to accept terms of the privacy policy which are in breach of the law can be deemed as unfair under Article 5 of the UCPD for being in breach of the duty of professional diligence and likely to distort consumers' behaviour in relation to the decision to accept or not the new policy.

⁴¹ www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9519943 (last access: July 2021).

⁴² <https://techcrunch.com/2021/01/14/confusion-over-whatsapps-new-tcs-triggers-privacy-warning-from-italy/> (last access: July 2021)

⁴³ SWD/2016/0163 final, 25 May 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163> (last access: July 2021).

**BEUC CPC alert
in a few
WhatsApp
messages**



Annex 1: Presentation of the changes in WhatsApp's FAQ (June 2021)

What is changing

You'll be able to talk to more businesses on WhatsApp to get things done faster compared to phone or email. This is completely optional.



Every day, millions of people use WhatsApp to communicate with businesses, large and small. You can message businesses to ask questions, make purchases, and get information. It's your choice whether you chat with a business on WhatsApp, and you can block or remove them from your contact list.

Bigger businesses, like an airline or retailer, might hear from thousands of customers at a time - asking for information on a flight, or trying to track their order. To make sure they can respond quickly, these businesses may use Facebook as a technology provider to manage some of the responses on their behalf. We will clearly label chats to make you aware when that happens.

We're providing further clarity about how we collect, share, and use data.



The changes to our Privacy Policy provide you with more detail on how we manage your information. We have added more detail to certain sections of our Privacy Policy and added new sections. We have also simplified the layout of the Privacy Policy and made it easier for users to navigate.

You can download a report of your WhatsApp account information and settings [here](#).

What is not changing

The privacy and security of your personal chats with family and friends will never change.



Neither WhatsApp nor Facebook can see the content you share with family and friends, which includes your personal messages and calls, the attachments you share, or the location you send. We do not keep logs of who everyone is messaging or calling, and WhatsApp does not share your contacts with Facebook.

You are in control. It's up to you whether or not you share your number with a business and you can block a business at any time.



WhatsApp will not give your number to a business, and our policies prohibit businesses from contacting you on WhatsApp without first receiving your approval to do so.

Our additional privacy features, such as [setting your messages to disappear](#) or controlling who can [add you to groups](#), give you an added layer of privacy.

Your acceptance of the new Terms of Service does not expand WhatsApp's ability to share user data with its parent company Facebook.



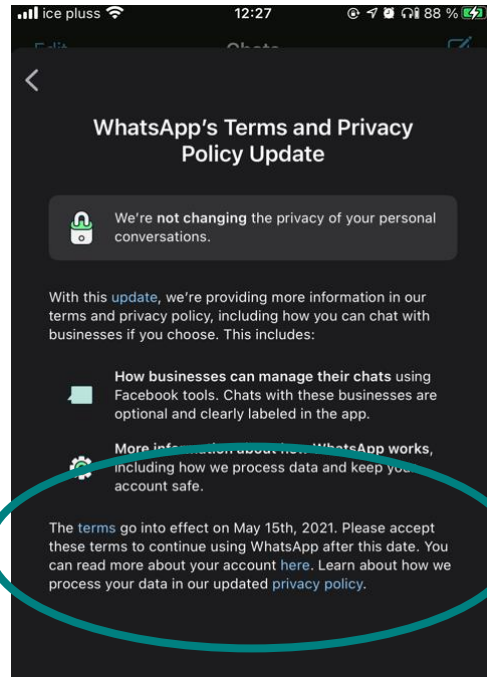
For more information, please review our [terms](#) and [privacy policy](#). You can also find answers to frequently asked questions [here](#).

Annex 2: Text of WhatsApp's notifications

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les [Conditions d'utilisation](#) entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).



↑ English version (taken on 29 June 2021)

Aktualisierung der Nutzungsbedingungen und der Datenschutzrichtlinie von WhatsApp

Wir **ändern nichts** an der Privatsphäre hinsichtlich deiner persönlichen Chats.

Diese [Aktualisierung](#) erweitert unsere Nutzungsbedingungen und unsere Datenschutzrichtlinie um zusätzliche Informationen beispielsweise dazu, wie du mit Unternehmen chatten kannst, wenn du das möchtest. Darunter:

Wie Unternehmen ihre Chats verwalten können, indem sie Facebook-Tools benutzen – Chats mit diesen Unternehmen sind optional und in der App eindeutig gekennzeichnet

Mehr Informationen darüber, wie WhatsApp funktioniert, unter anderem dazu, wie wir Daten verarbeiten und deinen Account schützen

Die [Nutzungsbedingungen](#) sind ab 15. Mai 2021 gültig. Bitte stimme diesen Bedingungen zu, um WhatsApp nach diesem Datum weiterhin nutzen zu können. Weitere Informationen zu deinem Account erhältst du [hier](#). In unserer [Datenschutzrichtlinie](#) erfährst du mehr darüber, wie wir deine Daten verarbeiten.

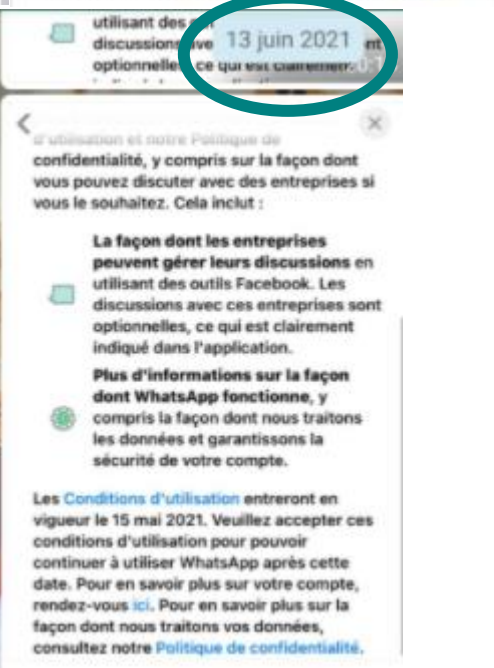
ZUSTIMMEN

← French version (taken on 4 July 2021)

← German version (taken on 21 May 2021)

Annex 3. Non-exhaustive list showing the recurrence of the notifications received by a WhatsApp user between end of May and early July 2021 (21 May, 4, 7, 8, 9, 11, 12, 13, 14, 16, 19, 20, 22, 23, 24, 25, 28, 29, 30 June, 1, 2, 4, 5, 6, 7, 8 July)





vous le souhaitez. Cela inclut :

14 juin 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les **Conditions d'utilisation** entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

16 juin 2021

notre Politique de confidentialité

Avec de tels outils, voici quelques informations à prendre en compte.

Nous ne pouvons pas lire ou discuter vos conversations personnelles, puisque elles sont chiffrées de bout en bout. Cela ne changera jamais.

Nous facilitons l'envoi de messages aux entreprises pour poser des questions et obtenir des réponses rapidement. Les discussions avec les entreprises sont optionnelles.

21:44

État de votre responsabilité d'ici 21:44

de confidentialité de WhatsApp

Nous ne modifions pas la confidentialité de vos conversations personnelles.

Avec cette mise à jour, nous vous fournissons plus d'informations dans nos Conditions d'utilisation et notre Politique de confidentialité, y compris sur la façon dont nous pouvons discuter avec des entreprises si vous le souhaitez. Cela inclut :

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les **Conditions d'utilisation** entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#).

vous le souhaitez. Cela inclut :

19 juin 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les **Conditions d'utilisation** entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

vous le souhaitez. Cela inclut :

20 juin 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les **Conditions d'utilisation** entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

vous le souhaitez. Cela inclut :

22 juin 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les **Conditions d'utilisation** entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

23 juin 2021

notre Politique de confidentialité

Avec de tels outils, voici quelques informations à prendre en compte.

Nous ne pouvons pas lire ou discuter vos conversations personnelles, puisque elles sont chiffrées de bout en bout. Cela ne changera jamais.

Nous facilitons l'envoi de messages aux entreprises pour poser des questions et obtenir des réponses rapidement. Les discussions avec les entreprises sont optionnelles.

13:23

État de votre responsabilité d'ici 13:23

de confidentialité de WhatsApp

Nous ne modifions pas la confidentialité de vos conversations personnelles.

Avec cette mise à jour, nous vous fournissons plus d'informations dans nos Conditions d'utilisation et notre Politique de confidentialité, y compris sur la façon dont nous pouvons discuter avec des entreprises si vous le souhaitez. Cela inclut :

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les **Conditions d'utilisation** entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#).

d'utilisation et notre Politique de confidentialité, y compris sur la façon dont vous pouvez discuter avec des entreprises si vous le souhaitez. Cela inclut :

24 juin 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les [Conditions d'utilisation](#) entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

d'utilisation et notre Politique de confidentialité, y compris sur la façon dont vous pouvez discuter avec des entreprises si vous le souhaitez. Cela inclut :

25 juin 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les [Conditions d'utilisation](#) entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

d'utilisation et notre Politique de confidentialité, y compris sur la façon dont vous pouvez discuter avec des entreprises si vous le souhaitez. Cela inclut :

28 juin 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les [Conditions d'utilisation](#) entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

confidentialité, y compris sur la façon dont vous pouvez discuter avec des entreprises si vous le souhaitez. Cela inclut :

29 juin 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les [Conditions d'utilisation](#) entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

30 juin 2021

d'utilisation et notre Politique de confidentialité, y compris sur la façon dont vous pouvez discuter avec des entreprises si vous le souhaitez. Cela inclut :

- La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook.** Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.
- Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.**

Les Conditions d'utilisation entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

1 juillet 2021

notre Politique de confidentialité

Avant de les consulter, voici quelques informations à prendre en compte.

- Nous ne pouvons pas lire ou écouter vos conversations personnelles, puisqu'elles sont chiffrées de bout en bout. Cela ne changera jamais.
- Nous facilitons l'envoi de messages aux entreprises pour poser des questions et obtenir des réponses rapidement. Les discussions avec les entreprises sont optionnelles.
- Il est de notre responsabilité d'...

de confidentialité de WhatsApp

Nous ne modifions pas la confidentialité de vos conversations personnelles.

Avec cette mise à jour, nous vous fournissons plus d'informations dans nos Conditions d'utilisation et notre Politique de confidentialité, y compris sur la façon dont vous pouvez discuter avec des entreprises si vous le souhaitez. Cela inclut :

- La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.
- Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les Conditions d'utilisation entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

2 juillet 2021

d'utilisation et notre Politique de confidentialité, y compris sur la façon dont vous pouvez discuter avec des entreprises si vous le souhaitez. Cela inclut :

- La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook.** Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.
- Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.**

Les Conditions d'utilisation entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

4 juillet 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les Conditions d'utilisation entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).

5 juillet 2021

La façon dont les entreprises peuvent gérer leurs discussions en utilisant des outils Facebook. Les discussions avec ces entreprises sont optionnelles, ce qui est clairement indiqué dans l'application.

Plus d'informations sur la façon dont WhatsApp fonctionne, y compris la façon dont nous traitons les données et garantissons la sécurité de votre compte.

Les Conditions d'utilisation entreront en vigueur le 15 mai 2021. Veuillez accepter ces conditions d'utilisation pour pouvoir continuer à utiliser WhatsApp après cette date. Pour en savoir plus sur votre compte, rendez-vous [ici](#). Pour en savoir plus sur la façon dont nous traitons vos données, consultez notre [Politique de confidentialité](#).



The notification received on 8 July was the last one to be added as the report was finalised on the same date.

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The European Consumer Organisation
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Europäischer Verbraucherverband

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