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WhatsApp's Privacy Issues: Views from the Malaysian Data Protection Perspective

Over these past few weeks, WhatsApp has been embroiled in a privacy controversy over its new terms and conditions relating to the sharing of users' personal data with its parent company, Facebook. Within days of the announcement, rival chat apps Signal and Telegram reportedly saw a spike in downloads — 1.3 million and 25 million new users, respectively.



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WhatsApp users were disgruntled with the new privacy policy, as it would require them to share their personal data with Facebook, for the social media giant to use to improve its products or for advertisements. Further, it appeared they would no longer have the option to opt out of such sharing, as it was reported that they must accept the new terms and conditions in order to continue using the messaging app after 8 February 2021. After the backlash, WhatsApp pushed back the update to mid-May.

Applying the Personal Data Protection Act 2010 (**PDPA**) to this scenario, the Disclosure Principle would be relevant. The Disclosure Principle states that unless consent is obtained, personal data cannot be disclosed:

- (a) for any purpose other than the purpose for which the personal data was to be disclosed at the time of collection of the personal data; or
- (b) to any third party other than the class of third parties specified in the data protection notice issued to the data subject.

Consent, however, is not defined in the PDPA. The PDPA and its regulations only provide the following:

- (i) Consent must be obtained in a form that can be recorded and properly maintained; and

- (ii) Where the form in which the consent is to be obtained also concerns another matter, the requirement to obtain consent must be presented distinguishable in its appearance from such other matter.

Therefore, assuming that the PDPA applies to WhatsApp, it can be said that a data subject's consent for WhatsApp to share his or her personal data with Facebook would be valid under the PDPA, even though the data subject does not in fact have the option to refuse such sharing if he or she wishes to continue using WhatsApp's services. In brief, the consent obtained by WhatsApp to share users' personal data with Facebook in this scenario would likely be valid under the PDPA.

In contrast, the position on consent under the European Union General Data Protection Regulation (**GDPR**) is stricter, as it provides that consent must be "freely given". Further, in assessing whether consent is freely given, the GDPR requires that utmost account shall be taken of whether the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract. Recital 43 further states that consent is presumed *not* to have been freely given, if the performance of a contract, including the provision of a service, is dependent on the consent, even though the consent was not necessary for such performance.

Based on the aforementioned, it is clear that the GDPR sets a higher standard on what constitutes valid consent. This also directly grants data subjects more say over the use of their personal data by data users. As far as Malaysia is concerned, it is high time that the PDPA is updated, so as to be in line with global data protection standards.

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