

# UNFAIR CONTRACT TERMS AND SHARING OF DATA WITH FACEBOOK, TOWARDS A BETTER PROTECTION OF SOCIAL MEDIA USERS: THE WHATSAPP CASES

Alessandra Cervone<sup>1</sup>

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## 1. INTRODUCTION

In the last years, important technological and economic developments have been taking place in the communications sector: consumers increasingly relying on new internet-based services, known as Over The Top services (hereafter, also referred to as OTT)<sup>2</sup>, instead of traditional communications services<sup>3</sup>. As OTT services, often offered by U.S. based companies like WhatsApp, are not yet adequately regulated under European Union Law<sup>4</sup>, their users face a very high risk of operator misconduct, which definitely creates a new challenge for the consumer protection agenda.

After a quick glance at the most innovative aspects of the two enforcement actions which Italian Competition Authority (hereafter, also referred to as ICA) carried out against WhatsApp Inc., this paper will analyse the main findings of the investigation.

On May 11<sup>th</sup>, 2017, the ICA closed two separate proceedings concerning alleged infringements of the Consumer Code (hereafter, also referred to as CC) by WhatsApp Inc., a California-based company part

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<sup>1</sup> Italian Competition Authority.

<sup>2</sup> OTT services are, for example, Voice over IP, instant messaging and web-based e-mail services provided, among others, by Skype, Facebook Messenger, WhatsApp.

<sup>3</sup> Traditional services are, for example, Voice telephone, SMS and electronic mail.

<sup>4</sup> See “Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)” - COM(2017) 10 final, which reports “*These Over-the-Top communications services (‘OTTs’) are in general not subject to the current Union electronic communications framework, including the ePrivacy Directive. Accordingly, the Directive has not kept pace with technological developments, resulting in a void of protection of communications conveyed through new services*”. It should be noted that the ongoing review of “ePrivacy Directive” (Directive 2002/58/EC of the European Parliament and of the Council of 12 July, 2002, concerning personal data processing and privacy protection in the electronic communications sector), announced in the Digital Single Market Strategy, aims to provide a high level of privacy protection for users of electronic communications services and a level playing field for all market players.

of the Facebook Group, provider of consumer communications services<sup>5</sup> via the mobile app “WhatsApp Messenger”. The first enforcement procedure (CV154 -WhatsApp - Unfair Terms), which started on October 20<sup>th</sup>, 2016, addressed imbalances in the user – provider relationship due to the application of some contractual clauses included in Whatsapp Messenger’s Terms of Service. At the end of the investigation, the ICA deemed these clauses unfair. The other probe (PS10601 - WhatsApp - Sharing personal data with Facebook), which started on October 27<sup>th</sup>, 2016, concerned WhatsApp’s aggressive conduct consisting in forcing “*de facto*” WhatsApp Messenger users to entirely accept new Terms, including the automatic transfer of consumers’ personal data to Facebook. The commercial practice under examination was deemed unfair and a fine of 3 million Euros was imposed on the company.

## 2. MOST RELEVANT AND INNOVATIVE ASPECTS OF THE TWO PROCEEDINGS

### 2.1 Personal data economic value: the transactional nature of WhatsApp users’ behaviour

The ICA recognises the economic nature of WhatsApp users’ behaviour in the decision to subscribe for free WhatsApp Messenger’s Terms of Service. In fact, even if the company offers its services without asking users to pay any fees, a “business to consumer” relationship originates as said users, in order to be able to interact with other people, make available to the provider a huge amount of information related to their account, including personal data and those of their contacts. Since it could be used by the provider for commercial purposes (e.g. customer profiling and marketing), such information represents high economic value. Personal data, even if they are not certainly just a commodity but, first of all, an expression of people’s personality, are definitively considered as a sort of consumers’ “counter – performance” of the communication service, alternative to money: the service claimed for free is indeed not so.

This evaluation is consistent with the position of the European Commission which, *inter alia*, in the “Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices” (hereafter, also referred to as UCPD), notes that “[p]ersonal data, consumer preferences and other user generated content, have a ‘de facto’ economic value and are being sold to third parties”<sup>6</sup> and qualifies Facebook

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<sup>5</sup> “Consumer communications services” are defined by the European Commission as “multimedia communications solutions that allow people to reach out to their friends, family members and other contacts in real time” (see competition case No. COMP/M.7217 – FACEBOOK/WHATSAPP, §13). For differences between “consumer communications services” (for example, WhatsApp, Viber, Facebook Messenger, Skype) and “social networking services” (for example, Facebook, Google+, LinkedIn), see competition case No. COMP/M.7217 – FACEBOOK/WHATSAPP, §§50-62.

<sup>6</sup> See “Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices”, (SWD(2016)163final, 25<sup>th</sup> May, 2016), paragraph 1.4.10, titled ‘Interplay with the Data Protection Directive and the e-

and WhatsApp as ‘traders’ under the UCPD<sup>7</sup>. The European Commission also confirms that social media operators, if supplying services to users residing in the European Union (hereafter also EU), should apply Terms of Services compliant to EU law<sup>8</sup>.

As to competition policy, the European Commission, in evaluating the acquisition of WhatsApp by Facebook, gave great emphasis to the economic value of personal data of consumer communications customers (i.e. Facebook Messenger’s and WhatsApp Messenger’s users).<sup>9</sup> More specifically, the Commission considered the relevant economic value of data collected from WhatsApp users while assessing if the transaction could have the effect of strengthening Facebook’s position in the online advertising market, thereby raising serious competition concerns.<sup>10</sup> Moreover, the Commission

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Privacy Directive’, p. 27. See also “Common position of national authorities within the CPC Network concerning the protection of consumers on social networks”, adopted on March 17<sup>th</sup>, 2017, under Reg. (CE) 2006/2004 on Consumer Protection Cooperation (CPC) among Member States authorities, paragraph B), titled “Fairness or lack of clarity of some ‘Standard Terms’ of social media services”, reporting that “[s]ocial media operators supplying services to users residing in the European Union (and in other EEA countries) shall use terms of services in their contracts that are in conformity with Directive 93/13/EC on Unfair Contract Terms. This Directive applies to all contracts between consumers and businesses, regardless of whether they involve monetary consideration, including contracts where consumer generated content and profiling represent the counter-performance alternative to money”. See finally “Proposal for a directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content” (COM 634/2015), recital 13, p. 16, where the European Commission affirms that “[i]n the digital economy, information about individuals is often and increasingly seen by market participants as having a value comparable to money. Digital content is often supplied not in exchange for a price but against counter-performance other than money i.e. by giving access to personal data or other data”.

<sup>7</sup> See above-mentioned “Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices”, paragraph 5.2.9, titled ‘Social media’, pp. 142-143, about the application of UCPD to specific sectors, reporting that “Social media such as Facebook, Twitter, YouTube, WhatsApp, Instagram and blogs enable users to create profiles and communicate with each other, including sharing information and content, such as text, images and sound files. [...] social media platforms can qualify as ‘traders’ in their own right, under the UCPD. [...] National enforcement authorities have identified a number of issues in relation to social media and EU consumer and marketing law, such as: [...] possibly unfair standard contract terms used by social media platforms; social media services being presented to consumers as ‘free’ when they require personal data in exchange for access [...]”.

<sup>8</sup> See above mentioned “Common position of national authorities within the CPC Network concerning the protection of consumers on social networks”, paragraph B), titled “Fairness or lack of clarity of some ‘Standard Terms’ of social media services”.

<sup>9</sup> See competition case No. COMP/M.7217 – FACEBOOK/WHATSAPP. It concerns the proposed concentration by which Facebook Inc. would have acquired control of the whole of WhatsApp Inc. for a purchase price of USD 19 billion. See also “Refining the EU merger control system”, Speech by Commissioner Vestager, Studienvereinigung Kartellrecht, Brussels, March 10<sup>th</sup>, 2016.

<sup>10</sup> See competition case No. COMP/M.7217 – FACEBOOK/WHATSAPP, §47: “the vast majority of social networking services are provided free of monetary charges. They can however be monetized through other means, such as advertising or charges for premium services”. See also §§ 167-190. The following paragraphs are the most relevant: “However, the Commission has examined whether the Transaction could nevertheless have the effect of strengthening Facebook’s position in the online advertising market, thereby raising serious doubts as to its compatibility with the market. For this purpose, the Commission has analyzed two main possible theories of harm, according to which Facebook could strengthen its position in online advertising by: (i) introducing advertising on WhatsApp, and/or (ii) using WhatsApp as a potential source of user data for the purpose of improving the targeting of Facebook’s advertising activities outside WhatsApp. Each of these two possible theories of harm is examined below” (§167); “According to this possible theory of harm, post-Transaction, the merged entity could introduce targeted advertising on WhatsApp by analyzing user data collected from WhatsApp’s users (and/or from Facebook users who are also

acknowledged that, in the market for consumer communications apps, the economic value of personal data is enhanced by the existence of “network effects”. This implies that “*the value of a product/service to its users increases with the number of other users of the product/service*”<sup>11</sup> or, in other words, that a product/service becomes more valuable when more people use it. The occurrence of this effect would depend on the possible integration between the two separate user networks of WhatsApp and Facebook through ‘cross-platform communication’ enabling users of both companies to communicate with each other<sup>12</sup>.

To this regard, the proceedings conducted by the ICA provided specific evidence since WhatsApp, during the hearings, admitted that sharing data with Facebook would improve the latter’s advertising activity and “*should generate revenues directly to Facebook*”. WhatsApp stated also that, in case the new business model based on its own users’ data were implemented, the company would get revenues for messages relating to notifications and updates sent to its customers and, more in general, the direct use of its customers’ data “*should generate revenues for WhatsApp*”.

## 2.2 WhatsApp’s and other social media’s Terms of Service should comply with European consumer law: the common effort at national and European level

Based on the above, users who accept WhatsApp Messenger’s Terms of Service, according to European consumer law, enter into a “business to customer” relationship with WhatsApp. It follows that the contract, when applied to residents in the European Union, is subject to the requirements of the Directive on Unfair Terms in Consumer Contracts (UCTD)<sup>13</sup>, as implemented into national laws. Hence, standard terms which create a significant imbalance in parties’ rights and obligations, to the detriment of consumers, should be deemed unfair and therefore invalid.

It should be noted that, in a context where often users are not even aware of the fact that “*by installing, accessing, or using [...] apps, services, features, software, or website*” they are subscribing to a contract with the service provider, the ICA’s enforcement action on WhatsApp’s Terms of Services has contributed to increase consumers’ awareness on the fact that (unfair) rules which lay down the rights and obligations for both users and traders exist also with respect to social media services.

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*WhatsApp users). This would have the effect of reinforcing Facebook’s position in the online advertising market or sub-segments thereof* (§168) (underlining added); “*The merged entity could start collecting data from WhatsApp users with a view to improving the accuracy of the targeted ads served on Facebook’s social networking platform to WhatsApp users that are also Facebook users*” (§180).

<sup>11</sup> See competition case No. COMP/M.7217 – FACEBOOK/WHATSAPP, §127. See also §129 reporting “[...] *the size of the user base and the number of a user’s friends/relatives on the same consumer communications app is of important or critical value to customers of consumer communications apps. These parameters increase the utility of the service for a user since they increase the number of people he or she can reach. [...]*”.

<sup>12</sup> See competition case No. COMP/M.7217 – FACEBOOK/WHATSAPP, §137.

<sup>13</sup> Council Directive (EC) 93/13 of 5 April 1993 on unfair terms in consumer contracts.

Moreover, the ICA's intervention on WhatsApp unfair contractual clauses anticipated the outcomes of a wider ongoing common action at European level on social media, included Facebook, owner of WhatsApp. In particular, the EU Consumer Protection Cooperation (CPC) Network<sup>14</sup>, through an action led by France<sup>15</sup> with the facilitation of the Commission, carried out a coordinated assessment of "Service Terms" between 2016 and 2017, by leading social media providers (Facebook, Twitter and Google+) to consumers residing in the EU, specifically identifying a number of terms as unclear or likely to create significant imbalance between social media operators and consumers. These terms are partly coincident to those deemed unfair by the ICA as a result of the proceedings against WhatsApp<sup>16</sup>. The common position of the CPC network was sent to companies which should now finalise detailed measures on how to comply with the EU regulatory framework.

### 3. THE PROCEEDINGS PS10601 AND CV154

#### 3.1 CV154 - WhatsApp Unfair Terms

As already stated, the terms of use of WhatsApp are subject to the requirements of the Directive on Unfair Terms in Consumer Contracts and, for Italian users, to the requirements of the Consumer Code, the Italian Decree which implements the Directive<sup>17</sup>.

The Consumer Code, which prohibits the use of certain contractual terms within the "business to consumer" relationship, contains a list of terms which are presumed "unfair", unless proved otherwise<sup>18</sup> as well as a "catch-all" provision, which states that "[i]n contracts entered into between consumers and professionals, terms shall be considered unfair where, contrary to good faith, they cause a significant imbalance in the rights and obligations arising under the contract, to the detriment of the consumer".<sup>19</sup> The Consumer Code,

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<sup>14</sup> The Consumer Protection Cooperation (CPC) Network is a pan-European enforcement network composed of national authorities and acting under the Consumer Protection Cooperation (CPC) Regulation (2006/2004/EC).

<sup>15</sup> French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF).

<sup>16</sup> CPC authorities have specifically identified the following terms as possibly unfair: Jurisdiction and applicable law; Waiver of mandatory consumer rights; Failure to identify commercial communications; Consumer's obligation to indemnify the provider and waiver by the provider of all its liabilities; Removal of user generated content; Power to unilaterally change and terminate the contract, for any reason and without reasonable notice; Power to unilaterally determine the scope and application of the terms and conditions.

<sup>17</sup> See arts. 33-38, CC.

<sup>18</sup> Art. 33, paragraph 2, CC.

<sup>19</sup> Art. 33, paragraph 1, CC.

furthermore, requires that Terms are drafted in plain and intelligible language so that consumers are informed in a clear and understandable manner about their rights<sup>20</sup>.

As a result of the investigation concerning the alleged unfair nature of some contractual clauses included in WhatsApp Messenger's Terms of Service, the ICA assessed as illicit, for the reasons hereafter explained, the contract terms concerning:

i) *Disclaimers and limitation of liability*

The CC provides that a term may be regarded as unfair when inappropriately excluding or limiting the legal rights of consumers in the event of non-performance or inadequate performance<sup>21</sup>. On this basis, the ICA deemed unfair the very broad and general exclusions and limitations of responsibility in favour of WhatsApp, including for intentional or gross operator misconduct. Service providers cannot limit or totally exclude their responsibilities in connection to the performance of any of their contractual obligations, included e.g. ensuring system security and data encryption, while they impose a general and absolute liability on consumers in connection to the latter's actions. Users should be able to exercise their rights to reparation related to the 'non' or 'partial' performance of the operator's contractual and other legal obligations, particularly in case of damages due to negligence. This implies that standard terms should be drafted in such a way as to provide different degrees of trader responsibility, according to the different types of events that may occur to the detriment of consumers and distinguishing between cases where an action or omission by a trader has contributed to the conduct or the damage/loss on which a claim is based and those where only third parties are responsible. In addition, the ICA considered insufficient WhatsApp's liability's cap of \$100, insofar as it creates a significant imbalance between the liability exposure of the service provider and that of its users, which is, in principle, unlimited according to the same Terms.

ii) *Availability of services*

The CC provides that a term may be regarded as unfair when "*making an agreement binding on the consumer whereas provision of services by the professional is subject to a condition whose realization depends on his own will alone*"<sup>22</sup>. On this basis, the ICA declared as unfair the option to unilaterally interrupt service for any reasons and without warning. If the occurrence of interruptions without any warning in case of events beyond the company's control and therefore not predictable is certainly admitted, the grounds for social media operators interrupting service should be always clearly explained in the contract as well as the way by which consumers will be informed with reasonable notice. WhatsApp's provision is very

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<sup>20</sup> Art. 35, paragraph 1, CC.

<sup>21</sup> Art. 33, paragraph 2, letter b), CC.

<sup>22</sup> Art. 33, paragraph 2, letter d), CC.

broad and very general, making it difficult for users to know when and why they risk having their service interrupted.

iii) *Unilateral termination of contract*

The CC provides that a term may be regarded as unfair when: a) “enabling the professional to terminate an open-term contract without reasonable notice, except where there are fair grounds for doing so”<sup>23</sup>; b) “authorizing only the professional to dissolve the contract where the same option is not granted to the consumer”.<sup>24</sup> On this basis, the ICA considered to be in breach of the Consumer Code a very broad and general right granted to WhatsApp to unilaterally terminate a contract at any moment and for any reason. WhatsApp’s provision on contract termination is, in fact, very discretionary, making it difficult for users to know when and why they risk no longer being allowed to access and use the service. Consequently, users are not even put into a condition to react promptly and defend themselves or seek redress.

Furthermore, the ICA found that WhatsApp’s Terms create a significant imbalance in the parties because the right to terminate the contract is not granted to consumers as well.

To that end, the ICA considered insufficient the in-app ‘delete my account’ feature because the Terms don’t indicate clearly that it is the only valid way to end the contract. A clear distinction should be made between the option to “delete the account” and the simpler and less effective option “to uninstall the application”. On this point, WhatsApp itself, during the proceedings, acknowledged that users adopt two different actions to cancel: a wrong one (removal of the app) and a correct one (deletion of the account). Only the latter would produce legal termination effects. It follows that users are confused and not allowed to make the correct choice as to the decision to terminate their relationship with WhatsApp.

Finally, even if users correctly delete their account, some provisions will still apply other than those which are typically intended, by their nature, to be still effective after termination (e.g warranties, claims). In particular, the survival of clauses like the following “*All of our rights and obligations under our Terms are freely assignable by us to any of our affiliates or in connection with a merger, acquisition, restructuring, or sale of assets, or by operation of law or otherwise, and we may transfer your information to any of our affiliates, successor entities, or new owner*”, makes, the right of consumers to end the contract not effective in any case.

iv) *Unilateral changes of the Terms*

The CC provides that a term may be regarded as unfair when “enabling the professional to alter the terms of the contract unilaterally, or the features of the product or service to be supplied, without a valid reason which is specified in

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<sup>23</sup> Art. 33, paragraph 2, letter h), CC.

<sup>24</sup> Art. 33, paragraph 2, letter g), CC.

the contract”<sup>25</sup>. On this basis, the ICA considered unfair the general right granted to WhatsApp to introduce changes, including of economic nature, to the Terms of Service without indicating in the contract the reasons according to which the company introduces those changes and without establishing adequate mechanisms for promptly informing consumers about them. With respect to unilateral changes, WhatsApp defended itself assuming that the consumers’ right to cancel the contract would be a sufficient consumer protection remedy. On this specific point, the ICA argued that, as already represented in the previous paragraph, such a remedy is not actually granted to consumers by the WhatsApp contract. Moreover, the ICA objected that, according to the European Court of Justice<sup>26</sup>, the notice of change of terms provided by the trader and the related right to cancel the contract are not alternative but complementary to the contract specification of the valid reasons which justify the change itself.

v) *Dispute resolution and jurisdiction clause*

The CC provides that a term may be regarded as unfair when “*in case of dispute, establishing as forum a jurisdiction other than the place where the consumer is resident or has his domicile of choice*”.<sup>27</sup> On this basis, the ICA assessed as illicit the choice of the law of the State of California as the only one competent in case of disputes, as well as the choice to submit litigations only to the jurisdiction of the U.S. District Court for the Northern District of California or of the State Court located in San Mateo County, California. Social media operators cannot deprive consumers in the EU of the right to bring proceedings in the Member State of consumers’ habitual residence and consumers may not be deprived of the protections of EU consumer law. This would *de facto* exclude or hinder the consumers’ right to take legal action or exercise any other legal remedy.<sup>28</sup>

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<sup>25</sup> Art. 33, paragraph 2, letter m), CC.

<sup>26</sup> European Court of Justice, Judgment 21 March 2013 (case C-92/11).

<sup>27</sup> Art. 33, paragraph 2, letter u), CC. As concerning, in particular, cross border jurisdiction, it should be noted that disputes are subject to the Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation”), which lays down the rules for jurisdiction and enforcement in civil and commercial matters. To this regard, article 18 (1) offers consumers the choice of either bringing proceedings to the courts in the Member State where they are domiciled or in the Member State where the other party is domiciled.

<sup>28</sup> As concerning the applicable law to WhatsApp’s Terms, it should be noted that, under Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (“Rome I Regulation”), art. 6 (1) provides that consumer contracts shall in principle be governed by the law of the country where the consumer has his habitual residence: “*a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities*”. The ICA excluded, in this case, the applicability of the exception under art. 6(2) as proposed by the operator. The exception, in particular, provides that, “*the parties may*

vi) *Termination of orders*

The CC provides that, “*in the case of contracts where some or all terms are presented to the consumer in writing, these terms must always be drafted in plain, intelligible language*”<sup>29</sup>. On this basis, the ICA found that a general right granted to WhatsApp to refuse or cancel “orders” and the broad exclusion to provide refunds for their services, without clarifying the circumstances under which those actions would be carried out, creates a significant imbalance in the parties’ rights and obligations, to the detriment of consumers.

vii) *Predominance of the English version of the Terms over the translated versions*

The CC provides that “*where there is doubt as to the meaning of a term, the interpretation that is most favourable to the consumer shall prevail*”<sup>30</sup>. On this basis, the ICA deemed unfair the term providing that whenever any translated version of the contract conflicts with the English version, the English version shall prevail. More specifically, in case of conflict, it is unfair to establish the general predominance of the English version of the contract over the Italian one (which is the only one accepted by Italian users) whereas the interpretation most favourable to the consumer should prevail independently of the language in which the contractual clause is written.

### 3.2 PS10601 - WhatsApp Sharing personal data with Facebook: alleged aggressive conduct

In the second investigation, the ICA ascertained that WhatsApp Inc. forced “*de facto*” WhatsApp Messenger’s users to accept in full the new Terms of Service, and specifically the provision to share their personal data with Facebook, by inducing them to believe that without granting such consent they would no longer have been able to use the service. Those consumers who had already used WhatsApp Messenger on the date the Terms of Service were modified (25 August 2016) had, instead, the option to accept only part of the changes, since they could decide not to give their consent to share with Facebook the information of their WhatsApp accounts and still be able to use the app.

The practice has been implemented through: a) an in-app procedure for obtaining the acceptance of the new Terms of Service characterized by an excessive emphasis placed on the need to subscribe the new conditions within the following 30 days or lose the opportunity to use the service; b) inadequate information on the option of denying consent to share with Facebook the personal data of the WhatsApp account; c) the pre-selection of the option to share the data (users should deselect the box

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*choose the law applicable to a contract*”. However, WhatsApp’s Terms of Service are a pre-formulated standard contract which consumers accept “*by installing, accessing, or using [...] apps, services, features, software or website*”. It follows that WhatsApp’s terms cannot be individually negotiated. This excludes that the provision establishing that “*[t]he laws of the State of California govern our Terms, as well as any Disputes*” could be the result of the parties’ choice.

<sup>29</sup> Art. 35, paragraph 1, CC.

<sup>30</sup> Art. 35, paragraph 2, CC.

to deny consent); d) finally, the difficulty of effectively activating the opt-out option once the Terms of Service were accepted in full.

The ICA also noted that, in the present case, undue influence had been enhanced by the nature of the service itself and the importance of the operator. In fact, consumers would have hardly given up WhatsApp Messenger which they use, for ordinary inter-personal communication, on daily basis, often as a replacement of traditional communications services (voice telephone, SMS). Moreover, customers of consumers communications apps are, generally, “multi-home”, which means that they use several consumer communications apps at the same time and are not likely to stop using any of them because of the burdensome costs involved in switching from one app to another<sup>31</sup>. Consumer switching costs would be represented by the loss of all data and interaction history when changing consumer communications app, which would also happen in case a WhatsApp account is deleted. Finally, changing providers would imply that users should build up a new profile and recreate their contacts network<sup>32</sup>.

It follows that WhatsApp Messenger’s users have been unduly conditioned to give a consent to new Terms, including data sharing with Facebook that is more extensive than the consent necessary to keep on using the app.

#### 4. CONCLUSIONS

Based on the above, as a result of the investigation, the ICA found that WhatsApp Messenger’s Terms of Service, having examined subparagraph 3.1), create a significant imbalance in the parties’ rights and obligations, to the detriment of consumers. Consequently, those terms have been deemed unfair as opposed to articles 33, paragraphs 1 and 2, letters b), d), g), h), m), u) and 35, paragraph 1 and 2, of Consumer Code. Since the company was not complying with the obligation of publishing an extract of the ICA’s decision on its website, the ICA also imposed a fine of 50.000 Euros, the maximum amount under Consumer Code for this kind of infringement.

The ICA likewise found that the commercial practice put in place by WhatsApp Inc., having examined subparagraph 3.2), significantly impaired the consumers’ freedom of choice with regard to the service and thereby caused them to make a transactional decision that they would not have made otherwise.

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<sup>31</sup> The European market for consumer communications apps features a significant degree of “multi-homing”, that is, “*users have installed, and use, on the same handset several consumer communications apps at the same time*”. In particular “*when they try new consumer communications apps, users do not generally stop using the consumer communications apps they were previously using*” (see competition case No. COMP/M.7217 – FACEBOOK/WHATSAPP, §§105, 110).

<sup>32</sup> See competition case No. COMP/M.7217 – FACEBOOK/WHATSAPP, §§114, 127-129.

Consequently, the examined practice has been deemed unfair as it infringed articles 20, 24 and 25 of the Consumer Code. The ICA adopted a prohibition decision, according to which the unfair commercial practice was banned and its continuation prohibited. Given the particular seriousness of the commercial practice, the ICA also imposed a fine of 3 million Euros.

In conclusion, the rapid development of OTT services, in replacement of traditional communications services, creates an high risk environment for consumers and considerably weakens their position in this market. The ICA's double enforcement action, in the social media area, both as far as unfair contract terms and unfair commercial practices has certainly contributed to safeguarding consumers' rights in a market where they are particularly vulnerable and to increasing consumers' awareness and trust in innovative communications technologies.