

Chicago, April 7th, 2021

***Facebook Group and WhatsApp Illegally Share Their Users' Data:
Requesting Brazilian Authorities to Take Action to Guarantee the
Population's Rights***

Part I

Introduction

Dear sirs and madams,

SumOfUs is a global movement whose central purpose is to fight for the respect of consumers and workers in order to ensure that the world's largest companies respect human rights, democracy, and the environment. We deeply believe in social mobilization as essential for building a better, more just, and more prosperous world.

Founded in 2011, the organization's campaigns have mobilized millions of people to demand that corporations prioritize humans and the planet over profit. The organization recently expanded its operations to the Portuguese language in December 2020 ([see website](#)), but, since its foundation, it has always worked with partners [to fight for the rights of indigenous peoples, environmental protection](#) and [other](#) major issues.

With the purpose of fighting for social justice globally, SumOfUs understands that it is of utmost importance to get involved in the subject matter that is the focus of this statement.

Among SumOfUs' many areas of operation, we have dedicated special attention to the global corporate abuse of the so-called **Big Tech**, regarding the **lack of legislation and/or enforcement in controlling their activities** and their dreadful impacts on a regional and

global level. We have a page dedicated to this topic on our website¹ for those interested.

In that sense, it was with **extreme concern** that SumOfUs received information that WhatsApp LLC ("WhatsApp") has again changed its terms of service and privacy to further increase access to and sharing of its users' data with the Facebook Group ("Group" or "Facebook").

Through this notice, SumOfUs hopes to add to the efforts of the processes already underway by the authorities and civil society on the subject, and also to provide relevant material for them. Thus, in addition to this statement, **we make available the full legal opinion commissioned to Maria Cecília Oliveira Gomes**,² a lawyer specialized in Privacy and Data Protection, regarding WhatsApp's new privacy policy and terms of service according to the Brazilian data protection legislation.

Part II

"When advertising is involved you the user are the product" - WhatsApp's website³

The Facebook Group's business model is **based on the collection and use of user data**, which is translated as information.⁴ Simply put, the more data you provide, the more information the Group has about each individual. This information is used to recommend, sell, offer, and personalize the user's online experience. In other words: the longer users stay on their platforms (Instagram, Facebook, Messenger, WhatsApp, etc.), the higher the company's profit margin potentially will be.

¹ Available at: <https://www.sumofus.org/pt/disinfo/>. Accessed on 4/7/2021.

² Maria Cecília Oliveira Gomes is a Lawyer and Consultant specialized in Privacy and Data Protection. Doctorate candidate in Philosophy and General Theory of Law at the Faculty of Law of the University of São Paulo (USP). Professor of privacy and data protection for educational institutions. She was a Visiting Researcher at the Data Protection Unit of the Council of Europe (CoE) in France. She was a Visiting Researcher at the European Data Protection Supervisor (EDPS) in Belgium. He holds a Postgraduate Degree in Intellectual Property and New Business from Fundação Getúlio Vargas (FGV).

³ Available at: <https://blog.WhatsApp.com/why-we-don-t-sell-ads>. Accessed on 4/7/2021.

⁴ [...] "it's widely understood that Facebook's voracious appetite for user data is driven by their business model which charges advertisers for access to precisely targeted segments of their massive consumer database." **Forbes**. Why Facebook Will Never Change Its Business Model. Available at: <https://www.forbes.com/sites/lensherman/2018/04/16/why-facebook-will-never-change-its-business-model>.

The indiscriminate collection and mismanagement of user data by social networks, in particular the Facebook Group, is well known to the public. The first of many scandals involving the misuse of its users' data collected by the Facebook Group happened in 2018, following the revelation of **Cambridge Analytica** by The Guardian and The New York Times⁵ during the 2020 US election. Since then the problem has been reported in documentaries⁶, literature⁷ and during several public hearings in the US Congress (most recently on March 25, 2021⁸) and also in the UK.⁹

In that sense, it was with **extreme concern** that SumOfUs received information that WhatsApp LLC ("WhatsApp") has again changed its terms of service and privacy to further increase access to and sharing of its users' data with the Facebook Group ("Group" or "Facebook").

To ensure a neutral, expert and legally sound analysis of the data sharing between WhatsApp and the Facebook economic group, SumOfUs requested a legal opinion regarding WhatsApp's new privacy policy and terms of service according to the Brazilian data protection legislation. The analysis resulted in a study of what would be the lawful bases for such, as well as whether consumers should be assured the right to opt-out, focusing on the data exchange between the WhatsApp application and the Facebook economic group. This legal opinion was prepared by Maria Cecília Oliveira Gomes,¹⁰ a lawyer specialized in Privacy and Data Protection, with extensive national and international experience in the matter. The legal opinion clearly points out the following (emphasis added):

⁵ **NYT** and **The Guardian**. Cambridge Analytica and Facebook Files. Available respectively at: <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>, <https://www.theguardian.com/news/series/cambridge-analytica-files>. Accessed on 4/7/2021.

⁶ **The Great Hack**, 2019, film, **The Social Dilemma**, 2020, film. Available on the streaming platform 'Netflix'. Accessed on 4/7/2021.

⁷ For example: "Trampled by Unicorns: Big Tech's Empathy Problem and How to Fix It", by Maelle Gavet; "The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power", by Shoshana Zuboff.

⁸ **NYT**. Is a Big Tech Overhaul Just Around the Corner? Available at: <https://www.nytimes.com/2021/03/25/us/politics/zuckerberg-dorsey-big-tech-congress.html?referringSource=articleShare>. Accessed on 4/7/2021.

⁹ **Terra**. Mark Zuckerberg é convocado para depor no Reino Unido. Available at: https://www.terra.com.br/noticias/tecnologia/canaltech/mark-zuckerberg-e-convocado-para-depor-no-reino-unido.5d7f11f4b78972610a722188e9ca31a7iekrvvs.html?utm_source=terra&utm_medium=barra20ds&utm_campaign=antivirus&utm_content=banner20barra20ds&utm_term=display&cdConvenio=CVTR00001907. Accessed on 4/7/2021.

¹⁰ Maria Cecília Oliveira Gomes is a Lawyer and Consultant specialized in Privacy and Data Protection. Doctorate candidate in Philosophy and General Theory of Law at the Faculty of Law of the University of São Paulo (USP). Professor of privacy and data protection for educational institutions. She was a Visiting Researcher at the Data Protection Unit of the Council of Europe (CoE) in France. She was a Visiting Researcher at the European Data Protection Supervisor (EDPS) in Belgium. He holds a Postgraduate Degree in Intellectual Property and New Business from Fundação Getúlio Vargas (FGV).

Sharing of data with the Facebook group as an abusive practice:

Given the complementary and subsidiary nature of the dialogue among the LGPD, the CDC, and the MCI, the processing of data operated by WhatsApp as it stands, specifically **the data sharing with the Facebook economic group for marketing-advertising and analytics purposes, may be considered unlawful.**

Apart from not having a valid lawful basis, by not guaranteeing granular control to the data subject, especially with the possibility of preventing new and secondary uses of their data from the new business model logic, **this represents an abusive practice and, potentially, an abuse of economic power.**

In January 2021, SumOfUs held a petition demanding that the Facebook Group not go ahead with the policy without guaranteeing its users' rights globally. To date, **the petition already has 209,067.00¹¹ signatures** worldwide. The petition has been translated into English, Spanish, German and French and distributed globally, including to Brazil, France, the United States, Germany, Austria, India, Australia, Mexico, Argentina and other countries.

Given the compelling conclusions of the legal opinion, SumOfUs elaborates this statement addressed to the Brazilian authorities. **The legal opinion in its entirety can be seen in the documentation filed.**

Part III

Abusive and illegal actions by the Facebook Group and WhatsApp in Brazil: an overview

Such concern is not insubstantial, considering **WhatsApp's market power in Brazil** and, therefore, the volume of private data collected from tens of millions of Brazilians.¹²

¹¹ SumOfUs Petition. Available at: <https://actions.sumofus.org/a/diga-nao-a-coleta-de-dados-em-massa-pelo-facebook?source=campaigns>

¹² **Estadão.** WhatsApp chega a 120 milhões de usuários no Brasil. Available at: <https://link.estadao.com.br/noticias/empresas/whatsapp-chega-a-120-milhoes-de-usuarios-no-brasil,70001817647>. Accessed on 4/7/2021.

WhatsApp is, indeed, a **crucial tool for the population**: according to the Panorama Mobile Time/Opinion Box survey, conducted in 2020, **99% of Brazilian cell phones have the WhatsApp application installed**, while 93% of users use the application daily¹³. Moreover, WhatsApp is the **main source of information for Brazilians** according to a survey commissioned by the National Congress.¹⁴

As detailed below, **it is clear that the Facebook Group is acting abusively and unlawfully** with the new WhatsApp policy and **its simple binary logic, i.e., the user must accept whatever Service Policy and Terms and Conditions the company imposes, or have their account blocked.**

Such behavior would be concerning, as well as unlawful, in any social context. But we cannot ignore the fact that **such unlawful behavior is forcing Brazilians to decide whether or not to abandon their main communication tool¹⁵ during the worst health and social crisis in the country's history, the Covid-19 pandemic.**¹⁶

At a time when physical distance and lockdown restrictions save thousands of lives every day, connection and video technology such as that offered by WhatsApp and enjoyed by tens of millions of Brazilians is not, in fact, a choice: it is a necessity.¹⁷ It is worth noting that the Group's monopoly is not limited to the WhatsApp app, but the entire range of Facebook Group services. Studies show that Facebook services are the most used by the Brazilian population: WhatsApp (54%), Instagram (14%), and the official Facebook app (11%).¹⁸

¹³ R7. Available at:

<https://noticias.r7.com/tecnologia-e-ciencia/whatsapp-esta-instalado-em-99-dos-celulares-no-brasil-02032020>. Accessed on 4/7/2021.

¹⁴ Correio Braziliense. WhatsApp é a principal fonte de informação dos brasileiros, indica pesquisa. Available at: https://www.correiobraziliense.com.br/app/noticia/tecnologia/2019/12/10/interna_tecnologia.812946/whatsapp-e-a-principal-fonte-de-informacao-dos-brasileiros-indica-pes.shtml. Accessed on 4/7/2021.

¹⁵ UOL. WhatsApp é o app mais usado por brasileiros; veja ranking. Available at: <https://olhardigital.com.br/2020/12/21/noticias/whatsapp-e-o-app-mais-usado-por-brasileiros-veja-ranking/>. Accessed on 4/7/2021.

¹⁶ DW. O mês mais mortal da pandemia no Brasil. Available at: <https://www.dw.com/pt-br/o-m%C3%AAs-mais-mortal-da-pandemia-no-brasil/a-57072879>. Accessed on 4/7/2021.

Washington Post. Brazil's rolling coronavirus disaster is a global problem. Available at: <https://www.washingtonpost.com/world/2021/03/17/brazil-coronavirus-disaster-bolsonaro/>. Accessed on 4/7/2021.

¹⁷ Estadão. Uso do áudio no WhatsApp cresce durante a pandemia, aponta estudo. Available at: <https://link.estadao.com.br/noticias/cultura-digital,uso-do-audio-no-whatsapp-cresce-durante-a-pandemia-aponta-estudo,70003424700>; Uol. WhatsApp teve mais de 1,4 bilhão de chamadas de voz e vídeo na véspera de Ano Novo. Available at: <https://gizmodo.uol.com.br/whatsapp-recorde-mensagens-vespera-ano-novo/>. Accessed on 4/7/2021.

¹⁸ Estadão. Uso do áudio no WhatsApp cresce durante a pandemia, aponta estudo. Available at: <https://link.estadao.com.br/noticias/cultura-digital,uso-do-audio-no-whatsapp-cresce-durante-a-pandemia-aponta-estudo,70003424700>; Uol. WhatsApp teve mais de 1,4 bilhão de chamadas de voz e vídeo na véspera de Ano Novo. Available at: <https://gizmodo.uol.com.br/whatsapp-recorde-mensagens-vespera-ano-novo/>. Accessed on 4/7/2021.

WHICH APP BRAZILIANS ACCESS MORE OFTEN
DURING THE DAY?

Question: Which app do you access more often
during the day?

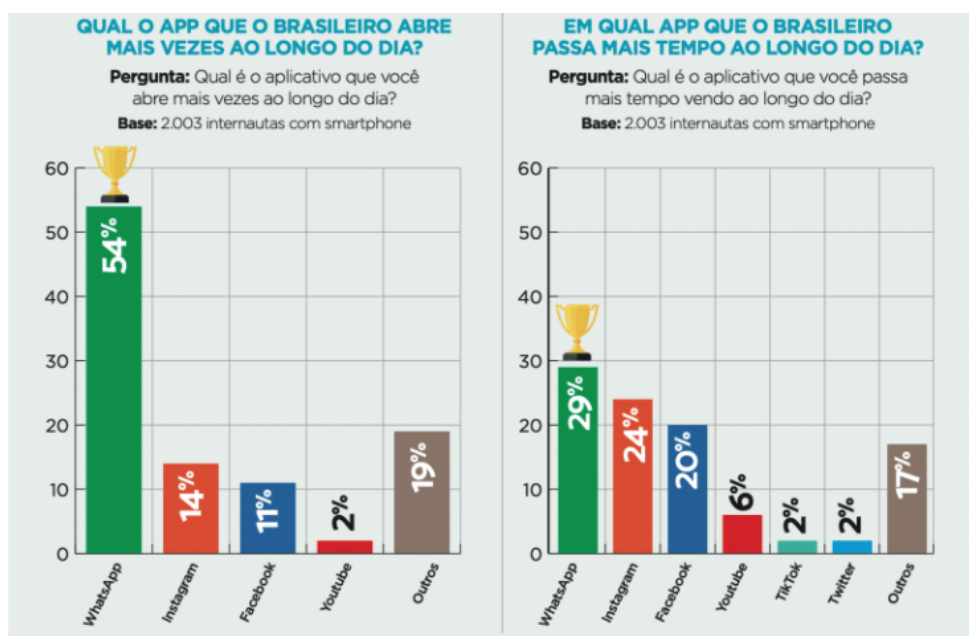
Basis: 2,003 internet users with smartphones

IN WHICH APP DO BRAZILIANS SPEND MORE TIME
DURING THE DAY?

Question: On which app do you spend
more time during the day?

Basis: 2,003 internet users with smartphones

WhatsApp remains the most popular app for Brazilian internet users, with a relatively comfortable position. Picture:
Mobile Time/Reproduction



O WhatsApp segue como o app mais popular para os internautas brasileiros, com uma posição relativamente confortável. Imagem: Mobile Time/Reprodução

Reproduction, available at <https://olhardigital.com.br/2020/12/21/noticias/whatsapp-e-o-app-mais-usado-por-brasileiros-veja-ranking/>

It is thus clear that **the Facebook Group is perniciously abusing its dominance in the Brazilian market** to impose any usage policies of its own interest at a time when, even if users wanted to prioritize the enforcement of their rights, doing so would be impossible for most of them. **The Brazilian population is being forced into a clear and evident abuse of**

power by the Group at one of the worst moments of its collective life, as a nation and individually.

Furthermore, although Brazil is central to the Group and the new WhatsApp policy is being updated globally, the user **on Brazilian territory is receiving discriminatory treatment compared to the protections afforded to European citizens by the Facebook Group.**¹⁹

Therefore, **considering the millions of Brazilians who use the platform, in qualitative and quantitative terms,** a careful and in-depth analysis of the data sharing between the Facebook economic group and WhatsApp is, in fact, **the main data protection case in the recent history of the country.**

Given the arguments presented in this statement, SumOfUs, as a non-governmental organization and committed to the respect of human and digital rights of the Brazilian population, respectfully invites **ANPD and Senacon to work in cooperation**, according to the terms of the Technical Cooperation Agreement signed²⁰ to **request clarifications from WhatsApp and Facebook, thus initiating an investigation into the adequacy of the company's terms of service and privacy policy.**

Therefore, we respectfully invite the authorities to consider the following requests:

1. **As a preliminary injunction**, in view of the **urgency** due to the imminence of the changes in the privacy policy and terms of service **in only 38 days**, the **risk and danger of damages to the consumers and data subjects**, as widely demonstrated with the irregularities pointed out above, to require:

- (i) a suspension of the change to the terms of service and privacy policy scheduled for May 15, until a full review by the authorities;

¹⁹ **BBC.** WhatsApp and Facebook to share users' data outside Europe and UK. Available at: <https://www.bbc.co.uk/news/technology-55573149>. Accessed on 4/7/2021.

²⁰ Among the joint actions provided for in Technical Cooperation Agreement No. 1/2021/GAB-SENACon/SENACon are institutional support and exchange of information, uniformity of understanding and coordination of actions, joint preparation of analyses and technical notes and cooperation in enforcement actions regarding the protection of personal data in the context of consumer relations (Clause one, a, c, e, g). The Agreement also establishes ANPD's duty to clarify its position on the interpretation and application of norms that impact the consumer, with a correlated duty on the part of Senacon (clause two, item b1 and d2).

2. **The suspension of data integration** between WhatsApp and other Facebook group companies, in line with how the Group already operates in the UK and EU;
3. That WhatsApp users continue to use the app, according to the rights provided by law, without any form of limitation or punishment to those who refuse to accept abusive terms by the Group regarding data sharing with third parties.

PART III

The legal issue

To ensure a **neutral, expert and legally grounded analysis of the data sharing between WhatsApp and the Facebook Economic Group**, SumOfUs requested a legal opinion on WhatsApp's new privacy policy and terms of service and their compliance with the Brazilian data protection legislation. **The analysis resulted in a study** of the lawful bases for such and whether consumers should be assured the right to opt-out, focusing on the data exchange between the WhatsApp application and the Facebook economic group. This legal opinion was prepared by attorney Maria Cecília Oliveira Gomes,²¹ specialized in Privacy and Data Protection, with extensive national and international experience in the matter. **The legal opinion clearly points out the following:**

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Legal grounds pointed out by the legal opinion concerning the illegality of the Facebook Group's operations in Brazil

As detailed in the Executive Summary of the legal opinion attached to this notice (pages 04 - 07), **the following are, in summary, the main arguments concerning the illegality of data sharing between WhatsApp and the Facebook economic group** (emphasis added):

1. The LGPD offers 10 (ten) lawful bases that authorize the processing of (non-sensitive) personal data. In that sense, consent, legitimate interest and performance of the contract appear as possible legitimization events that would validate the sharing of data for the marketing-advertising and analytics purposes provided for in WhatsApp's privacy policy changes since its acquisition by Facebook. As important as indicating such lawful bases is to note that the LGPD stipulates different legality parameters for each basis.
2. Within this context and in view of the criteria analyzed, **WhatsApp could not have used the lawful bases of consent, legitimate interest or performance of the contract for marketing-advertising and analytics purposes.** Thus, the different scenarios for the application of the lawful bases reveal different legal-regulatory non-compliances with the case at hand:
 - 2.1 **CONSENT:** the manifestation of the free-will must observe the following attributes, respectively: the consent must be informed; unequivocal; and express. In WhatsApp's case, there was no characterization of a valid consent. The application undermined all stages that qualify consent:

2.1.1. **INFORMED:** based on how the information regarding the changes in the processing purposes was presented to the user, the chaining of information is not clear enough for the user to be considered properly advised of the changes. Changes and controls are not shown upfront. The interface is misleading because it induces the data subject to agree to the changes without having the option to analyze the privacy policy in detail while being provided with the ability to object to certain uses of their data.

2.1.2. **UNEQUIVOCAL:** the lack of transparency harms this second attribute, since the free will of the user is questionable. This is especially true for the 2016 interface, since the acceptance checkbox of the dialog box that informs the user of the changes is already previously checked.

2.1.3. **EXPRESS:** the 2021 update of WhatsApp's policy eliminates the possibilities of control by the user over WhatsApp's data operation. The platform does not offer options to disable, partially or completely, the newly introduced purposes. The lack of control mechanisms confirms the absence of the right to opt-out. Thus, the application consolidates the journey through a contractual arrangement by adhesion and without any choice on the part of the data subject.

2.2 **LEGITIMATE INTEREST:** when we look at the four stages of the Legitimate Interest Assessment (LIA), such lawful basis does not support the data processing in question either:

2.2.1. **LEGITIMATE INTEREST AND CONCRETE SITUATION:** it has been noticed that WhatsApp does not correlate the types of data collected for each of these various purposes. The data set is not properly associated with the purpose that justifies its use. The lack of such a link affects the user's perception of a complex and cross-functional data flow, due to the change in the platform's business model.

2.2.2. **NECESSITY:** the data sharing for marketing-advertising and analytics purposes, based on legitimate interest, should be categorized separately regarding the data that are strictly necessary to operate the messaging services. Also, WhatsApp, as the controller, has not released any tests or criteria

adopted by the platform that would make it possible to analyze the correlation between the categories of data collected and the intended purposes.

2.2.3. LEGITIMATE EXPECTATIONS AND RISKS TO FUNDAMENTAL RIGHTS AND FREEDOMS: there is an accumulation and crossing of information from different contexts, not only that from WhatsApp, but from the entire Facebook group. As a result, several secondary uses of the data emerge, other than just for the provision of messaging services, which is not intuitive to the average citizen. The customization of features and content in companies of the Facebook Group is not something that is part of the standard user interaction with the platform. There is no direct correlation between the context of providing the messaging service and sharing information with the Facebook Group, which harms the legitimate expectations of its users.

2.2.4. SAFEGUARDS: the measures adopted to guarantee the rights of the data subjects and mitigate risks are not enough to cope with the volume of data processed by the platform. Mainly because of the lack of tools that would allow the data subject to customize quantitatively and qualitatively the flow of their data.

2.3 PERFORMANCE OF THE CONTRACT: we highlight the importance of identifying the link between the processing of personal data and the object of the main contractual relationship existing with the data subject, in addition to balancing the expectations that derive from this relationship. **The primary object of the contract is the provision of messaging services. The data collection for purposes newly introduced by the platform is not in line with this primary object, and therefore does not justify the application of the lawful basis.**

2.4 RIGHT TO OPT-OUT: the rights of the Brazilian data subjects have been reduced. **In addition to the lack of support for enforcing the lawful bases provided by the LGPD,** WhatsApp has also restricted access to the data subjects' rights as provided in the LGPD. **Since 2016, the so-called right to opt-out has been suppressed by the time limitation noted above.** With the **2021 update, the practice of not giving the user the choice** to disable, partially or completely, the data sharing consolidates.

2.4.1. 2.4.1. The lack of options infringes the data subject's rights. Since the choice is binary and imperative, without a compartmentalized collection, and offering only a universal solution (full acceptance of the changes or loss of access to the service), **WhatsApp fails to**

comply with a guarantee of the data subject associated with any obligation and responsibility set forth in the provisions of the LGPD, which is violated by the processing agent.

2.4.2. **Without the right to opt-out on WhatsApp, there is potential abuse of economic power, since the platform already occupies a dominant position in the Brazilian market. It creates an abusive obstacle for other economic agents that would compete with it in the marketing and messaging industry** and that do not have the same capillarity as it does. Even more so when considering that the right to opt-out, as established in the General Data Protection Act, must be aligned with the sectorial legislation. This is observed in the field of telecommunications, where ANATEL has undertaken efforts to promote and make it an absolute right of citizens to prevent the use of their data for marketing purposes, especially for telemarketing.

2.5 **ABUSIVE PRACTICE AND EXCESSIVE DISADVANTAGE:** there is reason to affirm that there is a **high imbalance in the controller-data subject relationship**. WhatsApp's dominant market position is marked by its reputation and promises to users regarding the control over their data, as well as risk mitigation mechanisms and tools to reduce intrusive measures. This image is **inconsistent with the new logic of the platform's business model after the acquisition by the Facebook economic group**. While there is no illegality in Facebook's business model and monetization of data for purposes such as ad targeting, marketing-advertising, and analytics, this does **disrupt the expectations raised in the market, before regulators and users**. The change in the business model not only increases the user's vulnerability, but also contradicts good faith.

2.6 This is a contradictory case. **Brazil has one of the most advanced legislation in the world when it comes to Internet use and consumer protection; however, such a fact is not reflected in WhatsApp's operation in the country. Despite being one of the app's largest markets, Brazil receives the lowest legal protection**. According to the 13 (thirteen) cases analyzed when mapping the most recent debates on this subject, stopping **data sharing between WhatsApp and the Facebook economic group is not only feasible but has been implemented in several countries in Europe under GDPR's jurisdiction**.

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***NOTE:** this document does not aim to address all the arguments and laws analyzed in the legal opinion. We recommend reading it in its entirety for a complete and detailed analysis of all the illegalities being committed by the companies and the legal grounds for such conclusions.*

PART IV

Steps taken by foreign authorities and discriminatory actions of the Facebook Group in Brazil

Since the Facebook Group is a global company and WhatsApp's new policy is also being applied globally, it is extremely important to observe how various authorities have approached the data collection and sharing relationship between the WhatsApp application and the Group, as these are important inputs for civil society and authorities to analyze whether there is a discriminatory behavior by the company depending on the region or country.

The statement sent by the Consumer Defense Institute, Idec, (**Coex Letter No. 80/2021, "Letter"**) on March 31, 2021 details clear examples of actions taken by authorities abroad, such

as in Italy, Spain, the United States, the United Kingdom, and India.²²

An action worth mentioning, already stated in Idec's Letter, is that of the US **Federal Trade Commission (FTC)**, which warned that despite WhatsApp's purchase by Facebook in 2014, **it was established that²³: if WhatsApp intended to change its privacy policies after the acquisition by Facebook, it would have to obtain valid consent from users before implementation**. At the time, Facebook promised that there would be no change in WhatsApp's plans and the way the company uses personal data.²⁴

Despite a publicly announced commitment, the promise was broken. The new 2016 privacy policy provided for the sharing of its users' data with the Facebook economic group. The purpose was to "improve experiences" of Facebook's services – with special regard to "Facebook ads and products." As a result, **new rules have completely overturned the business model matrix, especially the data flow between data subjects and the platform.**

This change has not gone unnoticed by consumer protection movements. In September 2016, Idec published the report *Consentimento Forçado?* ("Forced Consent?"),²⁵ which takes an in-depth look at the social and legal problems of such change.

In Europe, since 2018, Facebook has vowed not to share WhatsApp users' data with the Facebook Group,²⁶ an undertaking that has been reiterated even in the face of the new WhatsApp use policy, which is now the subject matter of this statement.²⁷

Another case worth mentioning was that of **The Hamburg Commissioner for Data Protection and Freedom of Information, Germany**. Even before the GDPR (General Data Protection Regulation) came into force in the European Union, **the German authority banned data**

²² See: Instituto de Defesa do Consumidor, Idec, Coex Letter No. 80/2021, "2. Atuação de outras autoridades e discriminação do cidadão brasileiro em face de tratamento privilegiado ao cidadão europeu".

²³ Facebook, Inc., In the Matter of - Civil Action Number 19-cv-2184, FCT Matter 092 3184 | 182 3109 | C-4309, 28/04/2020. Available at: <https://www.ftc.gov/system/files/documents/cases/c4365Facebookmodifyingorder.pdf>. Accessed on 4/7/2021.

²⁴ Available at: https://www.huffpost.com/entry/zuckerberg-Facebook-WhatsApp_n_4848205. Accessed on 4/7/2021.

²⁵ Idec. Consentimento forçado? Available at: <https://www.idec.org.br/pdf/relatorio-whatsapp-termos-de-uso.pdf>

²⁶ TheVerge. WhatsApp won't share user data with Facebook in Europe. Available at: <https://www.theverge.com/2018/3/14/17120446/whatsapp-user-data-sharing-facebook-uk-privacy-ico-protection-gdpr-europe>. Accessed on 4/7/2021.

²⁷ El País. WhatsApp compartilhará com o Facebook os dados de usuários de fora da União Europeia. Available at: <https://brasil.elpais.com/tecnologia/2021-01-08/whatsapp-compartilhara-com-o-facebook-os-dados-de-usuarios-de-fora-da-uniao-europeia.html>. BBC. As polêmicas novas regras do WhatsApp que exigem compartilhamento de dados com Facebook. Available at: <https://www.bbc.com/portuguese/geral-55606054>. Accessed on 4/7/2021.

sharing between companies and prevailed in the Court of Appeals. Here is an important excerpt from the Authority's press release²⁸:

"Facebook and WhatsApp are independent companies that process their user's data on the basis of their own Terms and Conditions and Privacy Policies. After the acquisition of WhatsApp by Facebook **in 2014, both parties have publicly assured that user data will not be shared between them without the data subjects' effective consent.** However, by introducing new Terms of use, WhatsApp informed the users in August **2016**, that their data would now also be transferred to Facebook. A choice for the users is not given.

The **Hamburg Data Protection Commissioner considers this practice as unlawful** and has therefore **prohibited the exchange** of data by means of an administrative order. To effectively protect the users, **the immediate enforcement was ordered.** Otherwise there would have been a risk that the data exchange will still be carried out as long as legal remedies are available to Facebook. **Facebook has appealed** to the administrative court against the order in the preliminary proceedings. The **goal was to repeal** the immediate enforcement. **The court rejected** this request today and clarified the fact that it does not see any legal basis for the planned data exchange.

Facebook can not invoke interests of its own business because the complete data exchange **is neither necessary for the purpose of network security or business analysis nor for advertising optimization.** Furthermore, the court clarifies that **there is no effective consent from WhatsApp users for a data exchange** with Facebook.²⁹

This is an important example since it illustrates that **the Facebook Group has no history of voluntary compliance with** national or regional **data protection legislation even when there is an express statement** by the authorities about the illegality of their behavior.

²⁸ Press release, April 25, 2017. Emphasis added by the author. Available at: https://datenschutz-hamburg.de/assets/pdf/Press_Release_2017-04-25_Facebook_and_WhatsApp.pdf.pdf. Accessed on 4/7/2021.

²⁹ Press release, April 25, 2017. Available at: https://datenschutz-hamburg.de/assets/pdf/Press_Release_2017-04-25_Facebook_and_WhatsApp.pdf.pdf. Accessed on 4/7/2021.

As we can see, the Facebook Group's abusive and unlawful behavior in Brazil (and in several other countries) is pointed out in the legal opinion attached here and in Idec's Letter. **There is, therefore, no reason to expect the company to bring the new standards into compliance with Brazilian law voluntarily**, since it has not done so since 2016, when they began the unlawful practice of exchanging details between companies. It is evident from its track record that **the Group's compliance with national data protection laws is only achieved after strong and forceful action by the competent authorities.**

Conclusion and Requests to the Authorities

According to the legal opinion on the sharing of WhatsApp users' data with the Facebook economic group, the companies' unlawful behavior in Brazil is clear. An aggravating fact is that, **in addition to taking unlawful actions** under the Brazilian data protection laws, **the Facebook Group takes advantage of its market dominance to impose the new usage policy in a binary manner, that is: if users do not accept the new unlawful usage policy, they are forced to leave the application during a time when the Brazilian population needs its main communication tool the most, that is, during the Covid-19 pandemic.**

Therefore, we reiterate our request for the authorities to take action. SumOfUs, as a non-governmental organization, respectfully invites **ANPD and Senacon to work in cooperation**, according to the terms of the Technical Cooperation Agreement signed³⁰ to **request clarifications from WhatsApp and Facebook, thus starting an investigation about the adequacy of the company's terms of service and privacy policy.**

Thus, we respectfully invite the authorities to consider the following requests:

4. **As a preliminary injunction**, in view of the **urgency** due to the imminence of the changes in the privacy policy and terms of service **in only 38 days**, the **risk and**

³⁰ Among the joint actions provided for in Technical Cooperation Agreement No. 1/2021/GAB-SENAICON/SENAICON are institutional support and exchange of information, uniformity of understanding and coordination of actions, joint preparation of analyses and technical notes and cooperation in enforcement actions regarding the protection of personal data in the context of consumer relations (Clause one, a, c, e, g). The Agreement also establishes ANPD's duty to clarify its position on the interpretation and application of norms that impact the consumer, with a correlated duty on the part of Senacon (clause two, item b1 and d2).

danger of damages to the consumers and data subjects, as widely demonstrated with the irregularities pointed out above, to require:

(i) a suspension of the change to the terms of service and privacy policy scheduled for May 15, until a full review by the authorities;

5. **The suspension of data integration** between WhatsApp and other Facebook group companies, in line with how the Group already operates in the UK and EU;
6. That WhatsApp users continue to use the app, according to the rights provided by law, without any form of limitation or punishment to those who refuse to accept abusive terms by the Group regarding data sharing with third parties.

With the utmost consideration, we ask the Brazilian authorities to take action immediately to ensure that the Facebook Group respects the rights of Brazilians. **We would like to reaffirm our commitment to collaborate and, therefore, we remain at the authorities' full disposal for clarifications.**

We appreciate your attention. We look forward to hearing from you and would like to thank you in advance.

Respectfully,

A handwritten signature in black ink, appearing to read "Emma Ruby-Sacks".

Emma Ruby-Sacks
Executive Director, SumOfUs

A handwritten signature in black ink, appearing to read "Flora Saraiva Rebello Arduini".

Flora Saraiva Rebello Arduini
Senior Campaigner, SumOfUs