



noyb - European Centre for Digital Rights
Goldschlagstraße 172/4/3/2
1140 Vienna
AUSTRIA

Austrian Data Protection Authority
Barichgasse 40-42
1030 Vienna

By e-mail: dsb@dsb.gv.at

Vienna, 28 November 2023

noyb case number : **C075**

Complainant:



represented pursuant to
Article 80(1) GDPR by:

noyb - European Centre for Digital Rights
Goldschlagstr. 172/4/3/2, 1140 Vienna, Austria

Respondent:

Meta Platforms Ireland Limited
Merrion Road
Dublin 4
D04 X2K5, Ireland

because of:

Article 5(1)(a) GDPR
Article 6(1) GDPR
Article 7(4) GDPR

COMPLAINT UNDER ARTICLE 77(1) GDPR

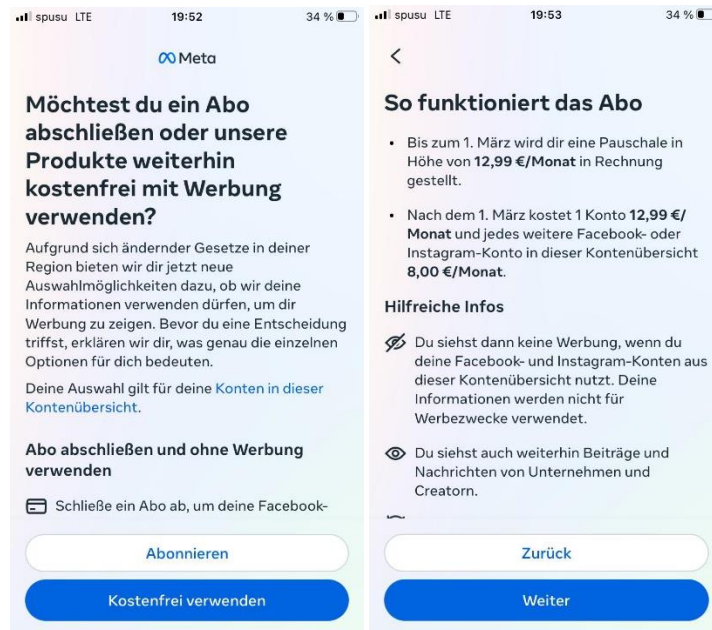
1. REPRESENTATION

1. *noyb* - European Centre for Digital Rights is a non-profit organisation active in the protection of the rights and freedoms of data subjects with regard to the protection of their personal data, with its registered office at Goldschlagstraße 172/4/2, 1140 Vienna, Austria, and with registration number ZVR: 1354838270 (hereinafter: "*noyb*") (**Annex 1**).
2. The complainant is represented by *noyb* in accordance with Article 80(1) GDPR (**Annex 2**).

2. FACTS

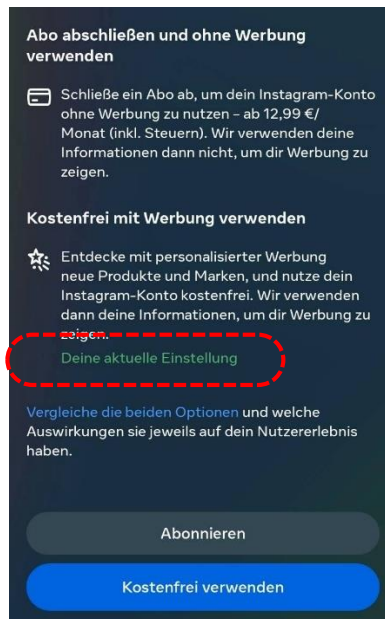
2.1. Presumed consent pursuant to Article 6(1)(a) GDPR

3. On 10 November 2023, when the complainant opened the Facebook app on his mobile phone he was confronted with the following advertisement, with the option of taking out a subscription for € 20.99 per month (i.e. € 251.88 per year) for his Facebook account and the linked Instagram account, from 1 March 2024 or agreeing to the use of his personal data for personalised advertising (**Annexes 3-5**):



4. The complainant chose "Use free of charge" due to the lack of a realistic alternative (see below).

5. The respondent has marked "Your current setting" as preselected, although no setting has yet been made:



(Screenshot from another mobile phone, as the complainant had not documented this page himself)

6. The controller has thus created a pre-setting similar to a "pre-ticked box", which must be actively deselected so that the supposed consent according to Article 6(1)(a) GDPR does not take place.
7. While free use can be completed in seconds with just two clicks, taking out a subscription takes significantly longer, which sometimes requires several steps as it includes entering credit card details and authorising payment via the user's banking app.

2.2. Market position of the respondent

8. Facebook is the largest "social" network¹ and has over 3 billion (!) monthly active users.² This figure corresponds to approximately 37.5% of the world's population. Instagram is used by over 2 billion monthly active users.³ Therefore, Meta has a monopoly on "social" networks that are not dedicated to a specific topic (e.g. business network LinkedIn) or a specific age group (e.g. TikTok).
9. In addition to the respondent's market dominance, communication platforms have an extremely high network effect. Unlike with other services, the complainant cannot simply use another network (such as Mastodon) because neither his family, friends, acquaintances, nor a large part of other sources of information relevant to him can be found on this platform.

¹ https://en.wikipedia.org/wiki/List_of_social_platforms_with_at_least_100_million_active_users; accessed on 20 November 2023.

² Meta Reports Third Quarter 2023 Results; https://s21.q4cdn.com/399680738/files/doc_news/Meta-Reports-Third-Quarter-2023-Results-2023.pdf retrieved on 20 November 2023 (**Annex 6**).

³ Salvador Rodriguez, *Instagram surpasses 2 billion monthly users while powering through a year of turmoil*, <https://www.cnbc.com/2021/12/14/instagram-surpasses-2-billion-monthly-users.html>; accessed 20 November 2023.

10. If the account is deleted, Meta allows personal data to be downloaded, but the value of a Facebook account lies less in old pictures and more in a collection of connections and friends that you cannot "take with you" (a so-called "lock-in effect").

2.3. Financial situation of the complainant

11. The complainant receives € 37.31 per day in unemployment assistance. In addition, he received housing benefit of € 91.88 per month. This results in an average monthly income of € 1211.18 per month.

12. The complainant has ongoing fixed costs of around € 980.31 (rent, electricity, gas, mobile phone, internet, insurance). He therefore has € 230.87 per month at his free disposal, from which food, clothing and any other costs must be paid.

13. In total, the complainant also had outstanding debts of at least € 2,473.02 (tax office, outstanding mobile phone and insurance bills and an association fee). His account balance (on 10 November 2023) was € -88.08 (**Annex 7-8**).

14. On 10 November 2023, the complainant therefore simply lacked the financial means to pay € 251.88 per year to Meta.

15. 21.6% of the EU population are at risk of poverty or social exclusion.⁴ This means that 1 in 5 people simply do not have the financial means to prevent their personal data from being processed for advertising purposes by taking out a subscription.

3. CONTEXT: META'S ROLE

16. It is obvious that Meta wants to secure its business model, which is based on the processing of personal data for advertising, by switching to a "pay or okay" model. Until now, Meta has lacked any valid legal basis for this.⁵ Instead of giving users a clear "yes/no" choice, Meta is now trying to extort supposed consent from its users with a "yes or pay" choice.

17. Added to this are the factors already mentioned, such as extreme market dominance and the inherent network effect due to widespread use. These factors create a lock-in effect, which make it extremely difficult to switch to another platform and confirms its users' dependency on the platform.

⁴ Eurostat regional yearbook, 2023 edition, p. 90, <https://ec.europa.eu/eurostat/documents/15234730/17582411/KS-HA-23-001-EN-N.pdf/5d783d9e-9cb3-897c-8360-5122563ae8f3?version=6.0&t=1700579783008>; accessed on 23 November 2023.

⁵ See EDPB, Binding Decisions 3/2022, 4/2022 and 5/2022, and ECJ in C-252/21, *Bundeskartellamt*.

4. GROUNDS FOR COMPLAINT

4.1. Infringements

18. The complainant is of the opinion that the respondent has violated the following applicable laws:
- (a) The respondent processed the complainant's data without a legal basis and thus violated Article 6(1) GDPR and Article 8(2) CFR.
 - (b) The respondent has attempted to link the alleged consent of the complainant to the free user contract. This model is contrary to Article 7(4) GDPR, as it is not necessary for the performance of the contract.
 - (c) The respondent processed the complainant's data unlawfully and thus violated Article 5(1)(a) GDPR.

4.2. Inalienability of fundamental rights

19. In this case, the complainant was required to consent to the processing of his personal data, which is protected by fundamental rights, or pay € 251.88 per year. The fundamental right to data protection under Article 8 of the CFR would thus (similar to the former right to vote in the census) only be granted to those who can afford it.
20. Even if some rights are inherently commercialised,⁶ fundamental rights are generally inalienable.⁷ They should be enjoyed equally by all. The fundamental right to data protection can therefore not be alienated to any other person and is highly personal. However, linking consent under Article 6(1)(a) GDPR to a payment has the exact opposite effect: the fundamental right is relinquished in exchange for a payment (or the avoidance of payment). As a result, the fundamental right would no longer be inalienable, but would degenerate into a commodity.
21. A sale or commercialisation of the fundamental right to data protection would also require a legal basis (see Article 52(1) CFR). There is no such legal basis for the sale in this case. The GDPR does not provide for a payment burden for the refusal of consent. Moreover, even such a legal basis would have to be examined for its proportionality.

⁶ Such as the fundamental right to property in Article 17 of the CFR, which provides precisely for the possibility of disposing of property.

⁷ The preamble to the TEU even uses the word "inalienable".

22. This also corresponds to the previous view of the EDSA:

- Binding Decision 3/2022, para. 101: "*The GDPR, pursuant to EU primary law, treats personal data as a fundamental right inherent to a data subject and his/her dignity, and not as a commodity data subjects can trade away through a contract*".⁸

- Guidelines 2/2019, para. 54: "*Since data protection is a fundamental right, [...] personal data cannot be considered a commodity. Even if the data subject can consent to the processing of personal data, they cannot trade their fundamental rights under this agreement.*"

4.3. No free consent

23. Irrespective of Article 8 of the CFR and primary law, Article 6(1)(a) in conjunction with Article 4(11) and Article 7 of the GDPR already requires that consent is only valid if it is "**voluntary**". Thus, the legislator explicitly wanted to ensure that the fundamental right to data protection is only relinquished if this also corresponds to the actual subjective will of the data subject. The GDPR, but also consumer law, for example, have a corresponding protective function in order to protect the free will of the data subject.

24. The question of whether a declaration of intent is "voluntary" is a psychological question of a person's inner will in the specific situation. From a legal perspective, it must therefore be determined whether the person concerned was "free" in their decision or whether various factors led to involuntary consent. In certain situations (such as the threat of a weapon), this is not particularly controversial. In the area of consumer rights and data protection, companies usually use more subtle methods (e.g. incomprehensible and hidden terms and conditions or "dark patterns") to systematically manipulate the free will of data subjects.^{9,10}

4.3.1. Difference of over 90% between actual will and consent rate

25. Providers of "Pay or Okay" systems advertise these systems by claiming that this system achieves almost "North Korean" consent rates of 99%.^{11,12} Calculations by *noyb* on the consent

⁸ [The GDPR, according to EU primary law, treats personal data as a fundamental right inherent to a data subject and their dignity, and not as a commodity that data subjects can trade through a contract."]

⁹ Forbrukerrådet, *Deceived By Design*, <https://storage02.forbrukerradet.no/media/2018/06/2018-06-27-deceived-by-design-final.pdf>; accessed 27 November 2023.

¹⁰ Forbrukerrådet, *Enough deception!*, <https://storage02.forbrukerradet.no/media/2022/11/report-enough-deception.pdf>; accessed 27 November 2023.

¹¹ V. Morel, C. Santos, V. Fredholm, A. Thunberg, *Legitimate Interest is the New Consent - Large-Scale Measurement and Legal Compliance of IAB Europe TCF Paywalls*, p. 3, <https://arxiv.org/pdf/2309.11625v3.pdf>; accessed 23 November 2023.

¹² *The insane 100 million euro tech exit story* by Dirk Freytag, 18 May 2022, interview in OMKB, <https://omkb.de/dirk-freytag/> Also shown in the corresponding video interview on the linked page from minute 48:45: "*Der Spiegel Pur*" has helped enormously that the topic is suddenly there and people see it. That people don't jump off and see that there are actually people doing this. And what is much more important for the publisher is that the consent rates, which today are between 65 and 85 per cent, are 99 per cent for them. So that means you can earn a lot more money with the others when it comes to advertising."

rate for the same election on the derstandard.at website have also shown a similarly high consent rate of around 99.3% to 99.9%.^{13,14}

26. A consent rate of around 99% speaks in itself against any free decision by users. Neutral surveys have demonstrated that only 3-10% of all users (taking an extremely generous view) want their personal data to be processed for personalised advertising on Facebook.¹⁵ In light of this fact, there is a discrepancy of over 90% to the actual inner will of the users.
27. It is therefore clear from public empirical studies and information alone that the free will of those affected is structurally undermined by a "pay or OK" system. If, in an electoral system, 99% do not exercise their right to vote even though they would like to, there is probably a blatant violation of Article 39 of the CFR. If 99% of all demonstrations are not authorised, the fundamental right to freedom of assembly under Article 12 of the CFR is probably no longer fulfilled. Similarly, there is probably no "voluntary" surrender of the fundamental right to data protection if over 90% of those affected are pressurised into giving consent that does not correspond to their free will.
28. The payment option is therefore purely an "alibi option" in order to present a superficial, supposedly "free" choice between two options. The "pay or okay" approach has therefore rightly been dubbed the "enforcer of 'voluntary' consent".¹⁶
29. Since the free will of the data subject does not exist from an empirical point of view, valid consent pursuant to Article 6(1)(a) GDPR can no longer be assumed at this point.

4.3.2. Disproportionate effort to reject

30. The refusal of the alleged consent required far more effort from the complainant than the granting of consent, as payment data must first be entered or a Google or Apple account must be set up for payment on iOS and Android devices.
31. Since the EDPB has already established that it is not permissible to have to go through additional pages in order to reach a decline button for ordinary cookie banners, this must apply all the more if payment data has to be entered in a cumbersome manner in order to refuse consent.¹⁷ There is no reasonable reason to apply a different and much more cumbersome standard for payment processes.

¹³ With a monthly reach of 11,730,000 and around 6,500 "PUR subscriptions", this resulted in a consent rate of 99.9%. See the figures: APA, *SNAPSHOT: PAID CONTENT IN AUSTRIA*, August 2019, p. 15, https://apa.at/wp-content/uploads/2020/04/Snapshot_Paid_Content_2019-1.pdf retrieved on 23 November 2023.

¹⁴ With now 22,000 "PUR subscriptions" (information provided by derstandard.at on 3 February 2023 at the hearing before the DSB) and almost 3.43 million monthly users of derstandard.at, this results in a consent rate of 99.3%.

¹⁵ Gallup Institute, *Facebook and Advertising - User Insights*, November 2019, page 7 (**Appendix 9**).

¹⁶ Matthias Eberl, *On the impurity of pure subscriptions*, August 2022, <https://medieninsider.com/pur-abo-zeit-rheinische-post-sachsische/12337/>; retrieved on 23 November 2023.

¹⁷ According to the vast majority of all data protection authorities in the EDPB's "Report of the work undertaken by the Cookie Banner Taskforce", January 2023, para. 8, https://edpb.europa.eu/system/files/2023-01/edpb_20230118_report_cookie_banner_taskforce_en.pdf retrieved on 23 November 2023.

4.3.3. Unlawful bundling contrary to Article 7(4) GDPR

32. The respondent is now essentially offering two contract options:

- **Product A:** Instagram and/or Facebook without any advertising for a fee
- **Product B:** Instagram and/or Facebook with linked consent to data processing

The second contract option can therefore only be selected with linked consent.

33. Although there is nothing to prevent the respondent from only offering its services for a fee (product A), Article 7(4) GDPR explicitly does not allow it to offer a contract such as for product B, which is made dependent on the complainant's consent to data processing. This is exactly what the respondent does here with the second alternative contract design.

34. As already established by the ECJ, tracking and the processing of personal data for personalised advertising is not necessary for the provision of services by the Facebook online platform (see ECJ, C252/21-, *Bundeskartellamt*, para. 149).

35. It is also unclear why the respondent also links the use of Facebook and Instagram for commercial purposes ("monetisation" of content) to the consent of the complainant and only offers him product B in this case.¹⁸

4.3.4. Abuse of market dominance

36. With Facebook, the respondent has enormous market dominance. It is not only the largest of all "social" networks, but also a platform that derives its value precisely from the fact that the same contacts, information, friends and acquaintances cannot be found elsewhere, or at most partially (network effect and "lock-in" effect).

37. Those affected, such as the complainant, therefore find themselves in a situation where there is no equivalent alternative available to them. For example, LinkedIn is used particularly for professional purposes and TikTok is designed for videos in a continuous loop, which primarily appeals to younger target groups - neither of these can replace Facebook.

38. Market power can also be seen from the fact that the respondent regularly imposes its own conditions on affected parties such as the complainant, as can be seen from the EDPB's Binding Decisions 3/2022, 4/2022 and 5/2022.

39. Given this clear imbalance and relationship of subordination (see Recital 43 GDPR), it is not possible to assume voluntary consent in this case, as the respondent is abusing its exceptional market position vis-à-vis the complainant.

¹⁸ In this case, the complainant is only allowed to use the platform via a contract for product A if he refuses to give his alleged consent and is thus charged a penalty fee. In addition, his (!) advertising and monetisation options are inexplicably restricted (**Annex 10**).

4.3.5. In any case, the price is also not an "appropriate fee"

40. In -C252/21 *Bundeskartellamt*, the ECJ also mentions in para. 150 that in the event of refusal of consent, users must be offered "[...] an equivalent alternative [...], if necessary for an appropriate fee". (emphasis added)
41. Unfortunately, this brief reference by the ECJ remains vague, as the main case and the questions referred did not concern such a situation. It is therefore, as far as can be seen, a non-binding obiter dictum. Nevertheless, the respondent's approach clearly contradicts this reference by the ECJ:
42. It is unclear what the ECJ considers to be "*reasonable remuneration*". The following approaches seem logical:
- (a) A price that does not significantly manipulate the actual consent rates and thus the will of the user (see above 4.3.1).
 - (b) A price that is affordable for those affected even with a further expansion of "pay or okay" systems.
 - (c) A price that covers the costs of the person responsible plus an appropriate mark-up ("*fair income*").
 - (d) A price that compensates for the profit to be made through personalised advertising, even if the respondent makes exorbitant profits here.
43. If the appropriateness of the price depended on the influence on the **actual consent rate**, it would be up to the respondent to demonstrate in accordance with Article 5(2) GDPR in conjunction with Article 7(1) GDPR that its chosen fee has no statistically relevant influence on the choice of data subjects and also not on the specific data subject (e.g. depending on personal disposable income or other relevant factors). There can be no question of this in the case at hand with a discrepancy of almost 90% to the user's will proven in studies and with practically no disposable income of the complainant.
44. Assuming an **affordable fee**, it is easy to calculate that any realistic amount is exceeded here: Google assumes that a person has an average of 35 apps installed on their mobile phones.¹⁹ If only the average installed apps were charged a similar fee, this would result in a "data protection fee" of €8,815.80 per year.²⁰ This does not include fees for websites or offline consent. Even with an average EU gross income of € 34,750²¹, this would result in a "data protection tax" of 25.3% per working person. For a family with two children, this would amount to € 35,263.20 per year just to keep the family's mobile phones free from data processing for personalised advertising.
45. The following would apply when calculating **appropriate remuneration to cover costs**: The cost of providing Instagram and Facebook is around 18% of revenue.²² The cost of providing

¹⁹ <https://www.thinkwithgoogle.com/marketing-strategies/app-and-mobile/average-number-of-apps-on-smartphones/>; accessed on 23 November 2023.

²⁰ This calculation does not even take into account the daily website visits per person per day.

²¹ https://ec.europa.eu/eurostat/databrowser/view/earn_ses18_26/default/table?lang=de; accessed on 23 November 2023.

²² Meta Earnings Presentation Q3 2023, p. 5, https://s21.q4cdn.com/399680738/files/doc_earnings/2023/q3/presentation/Earnings-Presentation-Q3-2023.pdf retrieved on 27 November 2023 (**Annex 11**).

"social" networks is not particularly high; Mastodon, for example, is operated by non-profit organisations. Even with a generous profit mark-up, a "reasonable fee" would therefore be far below the € 251.88 per year demanded by the complainant.

46. Even if one assumes that the price depends on the respondent's **loss of profits**, it must be noted that even here the price for the subscription is clearly overpriced:

- *Firstly*, the respondent forgoes the opportunity to place other types of advertising, such as context-based advertising. These losses are a decision of the respondent and therefore cannot be attributed to the complainant. According to a widely cited study, the difference in revenue between personalised and non-personalised advertising can be as little as 4%.²³
- *Secondly*, even if one (wrongly) assumes that all advertising must always be personalised, it should be noted that the respondent states an average turnover of \$ 16.79 per quarter and user between Q3 2022 and Q3 2023 in Europe.²⁴ At an Austrian National Bank reference rate of 1.0683 on 10 November 2023, this results in a turnover of € 5.24 per month and user. Even after deducting 20% VAT and levies to Apple of around 30%, the respondent would earn € 11.76 with the subscription and thus charges a surcharge of around 124.4% for refusing "consent" and using the subscription version. In this logic, he would suffer an economic "disadvantage" within the meaning of Recital 42 GDPR and there would be no voluntary consent.
- Of course, this neglects the fact that the provision of personalised advertising itself incurs costs (e.g. acquisition, tracking, data processing, engineering) that reduce this gross revenue. This factor should also be taken into account in an economically correct analysis.²⁵

47. However, a major problem with calculating the lost profit is that those responsible who analyse personal data particularly aggressively and thus earn an exorbitant turnover could also demand a higher subscription price. In the case of journalistic media, for example, it can be assumed that personalised advertising generates 4-10 cents per user per month, while Meta probably generates a higher turnover.

48. The flat-rate subscription prices also do not take into account the actual use and the actual turnover generated by the complainant on Facebook and Instagram (with "consent"). Especially for occasional users like the complainant, a flat-rate subscription model is unlikely to be economically appropriate, because a person who is online for 5-10 minutes per day pays € 251.88 per year, just like a person who consumes Instagram reels for hours every day. Even if the "reasonable fee" were to compensate for the respondent's loss of profit, this fee would

²³ V. Marotta, V. Abhishek, A. Acquisti, Online Tracking and Publishers' Revenues: An Empirical Analysis, May 2019, p. 6, https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf; accessed 27 November 2023 (**Annex 12**).

²⁴ Meta Earnings Presentation Q3 2023, p. 15, https://s21.q4cdn.com/399680738/files/doc_earnings/2023/q3/presentation/Earnings-Presentation-Q3-2023.pdf; accessed on 27 November 2023 (**Annex 11**).

²⁵ For example, the respondent itself states that the pure costs of providing the product ("*cost of revenue*") accounted for only 18% of all costs in Q3 2023. See: Meta Earnings Presentation Q3 2023, p. 5, https://s21.q4cdn.com/399680738/files/doc_earnings/2023/q3/presentation/Earnings-Presentation-Q3-2023.pdf; retrieved on 27 November 2023 (**Annex 11**).

have to be measured individually against the corresponding income resulting from its use. This is not the case here.

49. In any case, it should be noted for the present complaint that the complainant would pay a price that cannot be "*reasonable*" under any consideration.

4.3.6. Costs are not uniformly appropriate

50. In this context, it should also be noted that the respondent has now introduced a standardised fee for the EEA (and Switzerland)²⁶. However, the income situation in the various Member States is very different. The monthly gross average income in Bulgaria (€ 1,059) is about 17% of that in Denmark (€ 6,093), that in Greece (€ 1,381) about 19% of the income in Liechtenstein (€ 7,212).²⁷ The subjective appropriateness of a payment thus differs by a factor of 5 depending on the member state, even with an average income.

51. This means that wealthier Danish or Liechtenstein data subjects who use the platform excessively have significantly greater freedom of choice than Greek or Bulgarian data subjects who only use the platform occasionally.

4.4. Financial hardship of the complainant

52. As already mentioned, the voluntariness of the person concerned is a subjective element and therefore varies from person to person.

53. As can already be seen from the facts of the case, the complainant is in a persistent financial emergency. He simply cannot afford to refuse his consent. The complainant is actually faced with the choice of either paying for his food or his debts or giving up his fundamental right to data protection. It is in fact impossible for the complainant to give his consent "voluntarily".

4.5. Consent is not specific and uninformed

54. Furthermore, it remained unclear to the complainant what the alleged consent covered:

- Will adverts continue to be displayed for "free re-use", whereas they are simply hidden when the subscription is taken out?
- Or is "information" (does this mean personal data?) no longer collected for tracking when the subscription is taken out?
- Or will the activities still be tracked, but not analysed for advertising purposes?
- What would then be the legal basis for the continued tracking, the "big data" analysis of usage data and the generation of (other) personalised content, which in turn contains "native" advertising?²⁸

²⁶ <https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/>; accessed on 23 November 2023.

²⁷ https://en.wikipedia.org/wiki/List_of_European_countries_by_average_wage; accessed on 23 November 2023.

²⁸ This content (including the advertising contained therein, for example in postings and videos by "influencers") will in any case continue to be displayed using the complainant's personal data. There is no choice regarding the use of the complainant's data for the personalisation of content. Overall, the complainant's personal data will therefore continue to be used for advertising (via the diversions of personalised content).

55. For the complainant, the scope of his "consent" therefore remains unclear. Accordingly, he could not give informed and specific consent.
56. Further to the lack of transparency: Contrary to what the respondent claims ("*Due to changing laws [...]*" - **Annex 3**), no law has been changed. The GDPR remains the same. Rather, the ECJ stated in C252/21 that the respondent must obtain consent.

4.6. Foreseeable erosion of the fundamental right to data protection

57. If the respondent's approach were considered lawful, it would only be logical for other websites, apps and platforms to introduce a similar model in order to achieve almost 100% "consent".²⁹ This can already be observed in German-speaking countries, where the Austrian DPA first authorised the "PUR model" of *derstandard.at*, which has now led to a spread to hundreds of websites. The idea has since spread to other member states, right up to Meta's current approach with the subscription model in question.
58. As already described, the total burden for those affected can therefore quickly exceed € 10,000 per year. It will not be possible to authorise a subscription model for a few responsible parties, while prohibiting it for others.
59. It is also hardly justifiable to allow the first responsible party to pay a fee, but to introduce a cap for the second, third or fourth app, platform or website as soon as an individual affected party is financially overburdened in total. Such an overload may already exist for some affected parties, such as the complainant, with the first "Pay or Okay" system.
60. It is therefore foreseeable that without a clear rejection of a "pay or OK" system, the right to the protection of personal data will degenerate into a luxury good.

5. APPLICATIONS AND REQUESTS

5.1. Request for a prompt investigation & decision

61. In view of the above, the complainant requests that his case be investigated and decided quickly, as the facts of the case are sufficiently clear and, therefore only the legal issues involved need to be clarified.
62. This requires a resolute and determined approach by the DSB, particularly in the context of the obligations under Article 41 CFR and Article 6 ECHR and the length of proceedings to date under EDPB Decision 3/2022.

5.2. Requests for declaratory decision and orders

63. In view of the above, the competent authority may find that the respondent:

²⁹ <https://techcrunch.com/2023/10/02/tiktok-begins-testing-4-99-ad-free-subscription-tier/>; accessed on 23 November 2023.

- (a) processed the complainant's personal data for the purpose of personalised advertising without a valid legal basis and thus violated Article 6(1) GDPR in conjunction with Article 8(2) CFR,
- (b) linked the complainant's consent to the contract between the complainant and the respondent without this being necessary for the performance of the contract, contrary to Article 7(4) GDPR, and
- (c) processed the complainant's personal data for the purpose of personalised advertising without a valid legal basis and thus violated Article 5(1)(a) GDPR.

64. In view of the above, the complainant requests that the competent authority order the respondent to

- (a) to definitively refrain from processing the complainant's personal data for the purpose of personalised advertising without a valid legal basis within the meaning of Article 58(2)(f) GDPR,
- (b) to delete the processed personal data of the complainant for the purpose of personalised advertising within the meaning of Article 58(2)(g) GDPR in conjunction with Article 17(1)(d) GDPR and to inform all recipients of this deletion in accordance with Article 58(2)(g) GDPR in conjunction with Article 19 GDPR, and
- (c) to bring its processing operations into compliance with the GDPR within the meaning of Article 58(2)(d) GDPR and, in particular, to obtain legally valid consent from the complainant.

5.3. Urgency procedure pursuant to Article 66(1) GDPR

65. In view of the respondent's illegal data processing, which has been ongoing since 25 May 2018, and the inactivity of the lead supervisory authority, the complainant requests urgent proceedings pursuant to Article 66(1) GDPR, as the respondent systematically violates applicable law and willingly accepts the violation of the rights and freedoms of all Facebook and Instagram users in Austria (at least 5.38 million).³⁰

66. If there are no "exceptional circumstances" in the commercialisation of the right to data protection, which affects the majority of the population, by a multi-billion dollar company that has not only ignored but actively undermined applicable law for years, the question inevitably arises as to whether such circumstances could ever exist.

5.4. Suggestions

67. The complainant suggests that the competent authority instruct the respondent to bring its processing operations in accordance with Article 58(2)(d) GDPR and, in particular, to obtain legally valid consent from data subjects.

³⁰ <https://digitalewunder.at/social-media-plattformen-in-oesterreich-nach-nutzerzahlen/>; accessed on 23 November 2023.

68. The complainant proposes the imposition of an effective, proportionate and dissuasive fine for the offences found. In particular, it must be taken into account that the respondent

(a) systematically violates the GDPR (Article 83(2)(e) GDPR),

(b) to secure their business model (Article 83(2)(a) GDPR),

(c) accepts the violation of the rights of millions of Facebook and Instagram users (Article 83(2)(a) GDPR), while

(d) it obtains direct financial benefits from these infringements (Article 83(2)(k) GDPR), and

(e) at the same time prevents fair and undistorted competition (Article 83(2)(k) GDPR),

(f) although it would have extensive financial resources at its disposal to take legally compliant technical and organisational measures (Article 83(2)(d) GDPR).

6. CONTACT

6.1. Communication with noyb

69. Communication between *noyb* and the competent authority in the context of this procedure can be made by e-mail to [REDACTED], referring to the case number mentioned in the title of this complaint.

6.2. Contact us

70. We will be happy to assist you if you require further factual or legal details regarding the handling of this complaint. Please contact us at [REDACTED] or at [REDACTED].