

Meta fine: personalised ads in the firing line

For those hoping for a slightly quieter year in the world of data protection, the new year has already gone off with a bang and it seems that regulators are now turning their line of fire to personalised advertising.

In particular, the Irish Data Protection Commission (DPC) has issued eye-watering fines against Meta Ireland for not having a legal basis for processing personal data in connection with the delivery of its personalised Facebook and Instagram service, including the delivery of personalised advertisements (www.dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-two-inquiries-meta-ireland). In addition, the French data authority has fined Apple a not insignificant sum for breaching e-privacy rules in respect of the collection of data from user devices in order to serve up personalised advertising (see box “The Apple decision”).

The Meta decision

On 4 January 2023, the DPC issued a press statement to say that it had concluded its comprehensive investigation into Meta Ireland and has decided to fine Meta Ireland a total of €390 million (€210 million in respect of its Facebook service and €180 million in respect of its Instagram service) for various breaches of the General Data Protection Regulation (2016/679/EU) (GDPR). It also declared that Meta now has three months to bring its data processing operations into compliance.

This decision has potentially huge ramifications for Meta’s business model and will likely materially affect how it continues to operate within Europe. Meta is appealing the decision.

The complaints

The European Center for Digital Rights (None of Your Business, or NOYB) issued two complaints on the day that the GDPR came into effect in 2018: one in respect of Meta’s Facebook services issued by an Austrian data subject and the other in respect of Meta’s Instagram service issued by a Belgian data subject. As a result, the DPC had to investigate whether Meta has a lawful basis for its processing of user personal data in connection with the provision of its services.

Meta argued that the processing of users’ data in connection with the delivery of its Facebook and Instagram services was necessary for the performance of the contract with the user, which, in its view, is to provide personalised service and behavioural advertising. Historically, Meta had relied on consent to process user data to provide its services. However, just before the GDPR came into force, Meta changed its view and decided to rely on contractual necessity for some, but not all, of its processing operations. As a result, Meta updated its terms and required users to consent to its updated terms if they wished to continue to use Meta’s services. The complainants argued that, despite this change in approach, Meta was still relying on consent by forcing users to agree to updated terms.

DPC draft decision

While the DPC was the lead supervisory authority, as the breach was considered a cross-border breach, the “one-stop shop” mechanism was used and the DPC was required to gather opinions of other concerned supervisory authorities (CSAs). Accordingly, the DPC prepared a draft decision which it provided to the CSAs for approval (<https://noyb.eu/sites/default/files/2021-10/IN%2018-5-5%20Draft%20Decision%20of%20the%20IE%20SA.pdf>). In the draft decision, the DPC found that Meta was in breach of the transparency principle by not making it clear to users what lawful basis Meta was relying on to provide its service and proposed a fine of up to €36 million.

However, notably, the DPC opined that Meta could potentially rely on contractual necessity to process personal data for the delivery of its services, including advert personalisation.

Response of the CSAs

The CSAs agreed that Meta was in breach of the transparency principle but considered the fines proposed by the DPC should be increased. However, ten of the 47 CSAs raised objections that Meta Ireland should not be permitted to rely on contractual necessity as a legal basis because the delivery of personalised advertising was not necessary to perform the core elements of the Facebook and Instagram services.

The DPC disagreed, reflecting its view that the Facebook and Instagram services include, and indeed appear to be premised

on, the provision of a personalised service that includes personalised or behavioural advertising and that delivery of this personalised service is what users sign up for when they accept the terms of service.

EDPB response

As the DPC and the CSAs could not resolve this point, the DPC referred the issue to the European Data Protection Board (EDPB). The EDPB issued its determination on 5 December 2022 and, while it rejected many of the CSAs’ objections, it did agree with the dissenting CSAs that Meta could not rely on contractual necessity. It also required the DPC to increase the amount of the proposed fine. The DPC was obliged to follow the direction of the EDPB in its final decision.

Furthermore, the EDPB directed the DPC to conduct a fresh investigation in respect of Meta’s use of special category data in connection with the provision of the Facebook and Instagram services. In its public statement regarding the Meta fine, the DPC made it clear that it does not believe that the EDPB has the authority to instruct and direct the DPC to engage in open-ended and speculative investigation. The DPC referred to the direction as problematic in jurisdictional terms and inconsistent with the structure of the co-operation and consistency arrangements laid down by the GDPR and suggests it will take steps to get this direction annulled by the European Court of Justice.

Meta’s response

Meta has issued a lengthy blog expressing its disappointment at the DPC’s decision and stated that Meta will be appealing both the substance of the rulings and the fines (<https://about.fb.com/news/2023/01/how-meta-uses-legal-bases-for-processing-ads-in-the-eu/>). It has also tried to reassure brands that the decision does not prevent personalised advertising on its platform.

A turning point in the debate?

While this decision is likely to be considered a huge blow for Meta and other social media platforms, and will likely require some rapid strategic thinking about how best to position its Facebook and Instagram services in the future if the appeal is unsuccessful, this decision brings up lots of other interesting points of debate.

The Apple decision

On 29 December 2022, the French data protection authority, Commission nationale de l'informatique et des libertés (CNIL), fined Apple Distribution International (ADI) for not obtaining the consent of iPhone's French users to drop identifying tags on their devices for advertising purposes (www.cnil.fr/en/advertising-id-apple-distribution-international-fined-8-million-euros).

Following a complaint about the display of personalised ads on the app store, the CNIL investigated and found that under the old version of the iPhone operating system, identifying tags used for several purposes including personalised advertising, were dropped by default on the user's device without consent when they visited the app store. The user had to perform a large number of actions in order to deactivate this setting. The CNIL found this to be a breach of Article 82 of the French Data Protection Act and imposed a fine of €8 million.

The CNIL justified its jurisdiction to take action by arguing that the fine was issued in respect of the activities of the French establishment of the Apple group. As ADI considers itself a controller of the processing of personal data regarding the advert personalisation on the app store across its European business, it was the appropriate recipient of the fine. The CNIL also defended its position not to evoke the General Data Protection Regulation (2016/679/EU) (GDPR) co-operation mechanism by stating that it was materially competent to verify and sanction operations related to devices of users located in France as the case related to an e-privacy, not GDPR, breach, therefore the co-operation mechanism provided for by the GDPR did not apply. Apple plans to appeal.

While this decision is not as ground-breaking or likely to have the same impact as the Meta decision, it again demonstrates the CNIL's focus on cookie complaints and its willingness to take unilateral action in France outside of the one-stop-shop mechanism. Although it seems that the CNIL's focus is the large technology companies, this fine serves as a timely reminder that businesses with online operations in France should take steps to ensure a compliant approach to cookies as the CNIL takes no prisoners in this regard.

The lawful basis for personalised advertising has been a topic of much discussion in recent years. However, what is interesting here is that the debate usually centres on whether brands can rely on consent or legitimate interest. The draft decision issued by the DPC considered whether alternatives to consent could be relied on for the processing of personal data in connection with the provision of the Facebook and Instagram services but it then focused on whether contractual necessity could be a possible alternative, as this was the ground that Meta was purporting to rely on. It seems that the UK's Information Commissioner's Office in its latest direct marketing guidance is more open to the possibility of relying on legitimate interest in the context of direct marketing and online behavioural advertising, subject to strict parameters around enhanced transparency and easy opt-

outs (<https://ico.org.uk/for-organisations/direct-marketing-guidance-and-resources/>). It will be interesting to see when the DPC's final decision is published whether it goes into further discussion about the role of the legitimate interest ground, and whether that has a future.

The other key takeaway was the clear frustration within the DPC not only of the outcome but also around the decision-making process around cross-border processing complaints. It is clear from the press statement that the DPC feels aggrieved by the EDPB's intervention, so it is possible that further changes to the one-stop-shop mechanism will be discussed.

It will also be interesting to see what comes of the EDPB direction to carry out further

investigation around Meta's processing of special category data in connection with the provision of its services. If the DPC is required to carry out this investigation, this may well be a further difficulty for personalised advertising on social media platforms.

In what is almost a carbon copy of the EDPB approach in these cases, the WhatsApp decision announced on 19 January 2023 is likely to further aggrieve the DPC (<https://dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-inquiry-whatsapp>). Again the EDPB disagreed with the DPC on the question of legal basis, determining that WhatsApp Ireland could not rely on the contractual legal basis as a lawful legal basis for processing personal data for the purposes of service improvement and security. This was also accompanied by an EDPB direction to carry out further investigation around WhatsApp's processing of special category data in the provision of its services. The DPC press release is crystal clear in its dismissal of the EDPB's direction, stating its belief that such a direction is outside the EDPB's powers and jurisdiction. Given the DPC is the lead supervisory authority in many of the big tech investigations, the powers and jurisdiction of the EDPB and the one-stop-shop mechanism look set to be scrutinised in far greater detail in the coming months.

Finally, the Meta decision has also caused some agencies and advertisers to reconsider whether they should continue to use Meta for their advertising campaigns, particularly in light of the advertiser's and Meta's joint controller status. Unsurprisingly, Meta's view is that advertisers should continue to use its platform. While some may disagree with Meta's bullish approach, until the outcome of the appeal has been determined, and if the decision remains Meta has been given an opportunity to remedy it, it seems advertisers for now can continue to use the platform without fear of retribution.

What will be interesting is to see how this decision pans out and whether advertisers will also be in the firing line in the future if Meta does not change its ways.

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