

An assessment of Meta's new paid-subscription model from a consumer law perspective

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1. Background

Since November 2023, European users of Facebook and Instagram have been receiving notifications from Meta presenting them with a choice:

- ✓ “*Subscribe to use without ads*”: under this option, consumers pay a monthly fee of 9.99€/month (on the web) or 12.99€/month (on iOS and Android) to use Instagram and Facebook “without ads”.¹ This option comes with an assurance that the user’s information will not be used for advertising.²

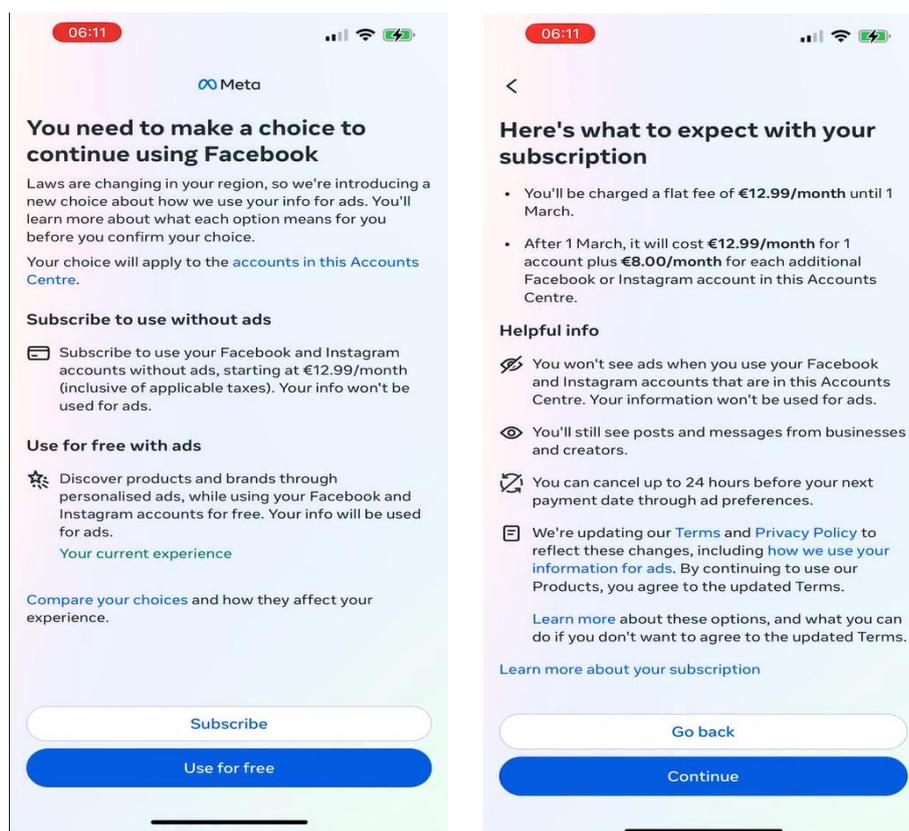
OR

- ✓ “*Use for free with ads*”: consumers give consent to being exposed to advertising, with their personal data being used for advertising purposes – but also stating that this is the users’ “current experience”.³

The lock screen message reads as follows:

*“You need to make a choice to continue using Facebook. Laws are changing in your region, so we’re introducing a new choice about how we use your info for ads. You’ll learn more about what each option means for you before you confirm your choice. Your choice will apply to the accounts in this Account Center.”*⁴

On a mobile device, this looks as follows:



¹ As from 1 March 2024, consumers subscribing to the paid model will be additionally charged 8€ for each additional Facebook or Instagram account.

² The browser lock screen notification reads ‘Subscribe to use without ads: Subscribe to use your Facebook and Instagram accounts without ads, starting at €9.99/month (inclusive of applicable taxes). Your info won’t be used for ads’ – retrieved 23rd November 2023. The (marginally different) mobile version of the notification will be discussed below.

³ The browser lock screen notification reads: “Use for free with ads: Discover products and brands through personalized ads, while using your Facebook and Instagram accounts for free. Your info will be used for ads. – your current experience”.

⁴ Some minor changes in the text were made since beginning of November 2023.

The notification presents the user with just the above two choices, while disturbing and sometimes preventing access to the main interface of the service. Upon further exploration, by following the “accounts in the Accounts Centre” or the “Compare your choices” link, users may find out that they can still request the download of their data and/or close their account. However, no mention of these options remaining available is made on the lock message.

Put simply, Meta has implemented a “pay-for-no-ad” model for Facebook and Instagram in the EU where users are required to pay approximately 120 € and 155 € annually⁵ if they wish to avoid their personal data being used for advertising purposes.



2. Legal assessment of Meta’s practice

From a consumer law perspective, the user is faced with a mandatory choice which needs to be taken for the continued use of the service, where the persistence of the newsfeed lock, the information provided, the choices imposed, and the overall context amount to an unfair, misleading, and aggressive practice.

2.1. A misleading practice

Meta’s practice is unclear, misleading and conveys to consumers an illusory sense of control and choice over their privacy.

2.1.1. Relevant EU legislation infringed by Meta

- o Article 5 of Directive 93/13/EEC

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail (...).

The UCTD Guidance⁶ further highlights that:

(...) The comprehensibility of the individual terms, in light of the clarity of their wording and the specificity of the terminology used, as well as, where relevant, in conjunction with other contract terms” are among the criteria to be considered when assessing the potential unfairness of a term.

- o Article 5 of Directive 2005/29/EC (“Prohibition of unfair commercial practices”)

A commercial practice shall be unfair if (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the

⁵ The annual fee will be 120€ or 155 € for the use of both services provided that the user’s Instagram and Facebook accounts are linked to the same “Accounts Center”. As 1 March 2024, if a new account is added to the ‘Account Center’, Meta will require an extra fee which can go up to 96€ per year for each new account added.

⁶ Commission Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts.

average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

Under Article 2 (e):

to materially distort the economic behaviour of consumers' means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.

The UCPD Guidance⁷ explains that transactional decisions are not only those resulting in a monetary exchange in the context of:

(...) commercial practices such as capturing the consumer's attention, which results in transactional decisions such as continuing to use the service (e.g., scrolling through a feed), to view advertising content or to click on a link.⁸

o *Article 6 Directive 2005/29/EC ("Misleading actions")*

A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise: (...) b) the main characteristics of the product (...); c) the extent of the trader's commitments, the motives for the commercial practice (...).

Furthermore, the UCPD Guidance document explains that:

There is an increasing awareness of the economic value of information related to consumers' preferences, personal data and other user-generated content. The marketing of such products as 'free' without adequately explaining to consumers how their preferences, personal data and user-generated content are going to be used could be considered a misleading practice in addition to possible breaches of data protection legislation.⁹

o *Article 7 of Directive 2005/29/EC ("Misleading omissions")*

1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. 2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise (...)

2.1.2. *Application to Meta's practice*

European consumers are faced with what Meta presents as a simple choice: either subscribing to a "free" service but with ads, or to a paid-one without ads. In reality, the way the choices are offered is misleading and omits key information that consumers would need to make an informed decision.

⁷ Commission Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

⁸ *Idem*, section 4.2.7 (data-driven practices and dark patterns).

⁹ *Idem*, section 3.4.

➤ **Consumers subscribing to the paid service are misled and insufficiently informed**

Based on the promise of an ‘ad-free’ experience, consumers subscribing to the paid option may likely see it as an opportunity to opt out of Meta’s tracking and profiling practices. Yet, this is not the case.

The paid subscription Meta offers will provide consumers with a service where their data will not be used for showing ads anymore. However, this implies that even those consumers who have subscribed to Facebook or Instagram’s paid services will continue to have their personal data collected and used for other purposes than ads. Meta’s privacy policy¹⁰ mentions for example the following data treatment activities which Meta carries out regardless of whether or not a consumer has subscribed to the paid option:

- “Personalising the Meta Products (other than ads)”
- “Providing measurement, analytics and business services”
- “Providing and improving our Meta Products”

What further supports this interpretation is that Meta has so far declined to comment on whether the data of the paid service subscribers would be used for anything other than ads.¹¹

Moreover, Meta’s promise not to show any advertising to paying consumers is already being disproven **as promotional content and advertisements on the services continue to be displayed**. For example, a recent Wall Street Journal case study from France on an ‘ad-free’ Instagram subscription reported that it is not possible to fully escape promotional content from followed and non-followed accounts.¹² The paying user is still being targeted with promotional posts (some marked as “paid promotion”, others not) originating e.g., from influencers. As several reports have shown¹³, many paid promotions are not labelled as such and continue to be deployed on Instagram and Facebook, **making a totally ad-free environment impossible even for those who have paid for it**. As with all other content on these services, such promotional posts are targeted based on personal data, which Meta does not mention when asking people to pay for a supposedly ‘ad-free’ service.

➤ **...Just like those who select the free service**

Meta presents the alternative to the paid subscription “as continuing for free”, which is also not true. **Meta’s products are not “free”**. This has been confirmed for example by an Italian court judgment of 10 January 2020 fining Facebook for marketing its service as “free” (“*Facebook is free and always will be*”) and hiding the fact that the “counter-performance” in the contractual relationship is in fact provided in the form of personal data which has a measurable economic value and is used outside the scope of operating a social network.¹⁴ By describing its non-paid service as being “for free”, Meta misleads consumers into believing that they will be able to use the product without giving anything in return. This interpretation is confirmed by the European Commission’s Guidance document as per below:

Products presented as ‘free’ are especially common in the online sector. However, many such services collect personal data of users such as their identity and email address. Importantly, the UCPD covers all commercial practices concerning ‘free’ products and does not require payment with money as a condition for its application. Data-driven practices involve an interplay between EU data protection legislation and the UCPD. There is an

¹⁰ www.facebook.com/privacy/policy/version/6218528774917551/ (last consulted: November 2023).

¹¹ www.wired.co.uk/article/meta-facebook-pay-for-privacy-europe (last consulted: November 2023).

¹² <https://iapp.org/news/a/a-review-of-metas-ad-free-subscription-option-for-instagram/> (last consulted: November 2023).

¹³ Among others, in 2023 in France the CPC Authority (DGCCRF) fined several social influencers for hidden and/or misleading advertising on various social media networks, including on Instagram. In the US, the Federal Trade Commission also highlighted several hidden and misleading ads on Instagram (www.ftc.gov/business-guidance/blog/2023/11/staff-warning-letters-trade-associations-influencers-convey-some-salty-words-about-sweetener-posts). In the United Kingdom, an investigation by the Competition and Markets Authority has been ongoing since 2018 concerning hidden advertising, in the course of which Facebook and Instagram have offered commitments to improve their practices: www.gov.uk/cma-cases/social-media-endorsements

¹⁴ Tar Lazio, Roma, Sez.I, Judg. 00260/2020 and 00261/2020 published on 10 January 2020.

increasing awareness of the economic value of information related to consumers' preferences, personal data and other user-generated content. The marketing of such products as 'free' without adequately explaining to consumers how their preferences, personal data and user-generated content are going to be used could be considered a misleading practice in addition to possible breaches of data protection legislation.¹⁵

The “continue using for free” framing also creates a false impression that nothing will change for consumers if they agree to the non-paid version. In fact, Meta has until now been collecting and treating consumers' personal data without a valid legal basis under the GDPR.¹⁶ Following a series of recent decisions by data protection Authorities and the CJEU¹⁷, Meta now has no choice but to ask consumers, for the first time, to give their express consent to being subjected to tracking and profiling. If this information was provided upfront (instead of the misleading “changing laws” wording as in reality, the changes are the results of several enforcement actions taken recently against Meta) consumers would be less likely to accept such a “free access” option.

2.2. An aggressive practice

Meta' practice is aggressive as it leaves many consumers with no other choice than agreeing on the use of their personal data for advertising purposes.

2.2.1. Relevant EU legislation

- o *Art. 8 of Directive 2005/29/EC (“Aggressive commercial practices”)*

A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

- o *Art. 9 of Directive 2005/29/EC (“Use of harassment, coercion and undue influence”)*

In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of (...)

(c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;

(d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;

[...]

- o *Annex of Directive 2005/29/EC (pt 24):*

Creating the impression that the consumer cannot leave the premises until a contract is formed.

¹⁵ Commission Guidance on the interpretation and application of Directive 2005/29/EC, Section 3.4.

¹⁶ Art.6 and 7 GDPR.

¹⁷ CJEU, case C-252/21 *Meta*, 4 July 2023 (ECLI:EU:C:2023:537); see also: www.dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-two-inquiries-meta-ireland (last consulted: November 2023).

The UCPD Guidance¹⁸ further provides:

An aggressive practice should entail active conduct by the trader (harassment, coercion or undue influence) which limits consumers' freedom of choice.

2.2.2. Application to Meta's practice

➤ **Generating an impression of urgency, persistence, and limited choice**

Meta's practice entails a sudden blockage or disruption of services of the user interface, depriving the consumer from accessing their newsfeed as they would like until they select one of the two access options. In the case of the average consumer, this is likely to create the impression that they have no other choice – particularly given that their screen appears blocked, and only gives them two options for entering into a subscription, both harmful to the consumer's interests as explained above.

Consumers rejecting both choices will not have an easy task. There is no option to download one's data or to delete the profile on the initial lock screen. Only the tech-savvy consumers will be able to navigate their account page and download their data and/or close the account from there. More sophisticated users may decide to wait to observe the behaviour of the lock and find out that, on some devices, the screen lock may disappear for a while before appearing again, thus making it easier to part with the service.

However, most consumers are likely to succumb to the impression of urgency imposed by the screen lock. This amounts to a **forced subscription** practice and should be seen as a **dark pattern** which unduly pushes the consumer to agreeing to one of the presented options without being able to exercise a free and informed choice.

➤ **Lack of alternatives and risks of discrimination, in particular for economically vulnerable consumers**

The subscription to Meta's paid service requires consumers to pay (at least) 120 € annually. This amount is considerable and not affordable, in particular for economically vulnerable consumers. Recently, the European Commission designated Meta as a "gatekeeper" under EU Regulation 2022/1925 (the "Digital Market Acts" – DMA)¹⁹ with respect to Instagram and Facebook qualified as "core platform services" in the social network area.²⁰ **There is in reality no other equivalent service that consumers can turn to if they are unwilling or unable to pay.**

Given, on the one hand, the lack of choice of a comparable social media service provider which consumers could use to communicate with their network of friends and family, and, on the other hand, the significant costs for an "ad-free" service - which is also unclear in terms of its added value - consumers are captured and left with no other solution than accepting Meta's offer and consenting to continuing the status quo. As such, Meta generates conditions significantly impairing and influencing consumers' decisions with regard to their consent to continue using Meta's services.

As the spokesperson of the Norwegian Data Protection Authority (*Datatilsynet*) summarized it, "*essentially this amounts to extortion: either pay us or give away all of your rights. If users don't like either the paid or free models, they can't just leave Meta and choose an alternative social platform, meaning they are not giving their consent*"

¹⁸ Commission Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market.

¹⁹ EU Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector.

²⁰ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

freely. If you want to be on the same platform where all your friends and family are, most likely it will have to be Facebook or Instagram. It doesn't help switching to Pinterest".²¹

Finally, Meta's practice puts a **significant burden, in particular on financially disadvantaged consumers** who may not have the option to pay for such an expensive service. All of this contributes to making privacy, which is yet a fundamental right enshrined in the EU Charter, a right with a price on it, or put simpler, a "luxury good reserved only for the wealthy".²²

3. Systematic GDPR infringements must be considered unfair commercial practices prohibited under EU consumer law.

Pushing consumers towards a policy likely to be in breach of the GDPR also constitutes an unfair commercial practice prohibited under the UCPD.

Meta's new policy has raised major concerns among European data protection Authorities²³ and civil society organisations.²⁴ According to EU Regulation 2016/679 (the General Data Protection Regulation - GDPR) and recent rulings, the collection of personal data for advertisement purposes by Meta can only take place if consumers provide their free and informed consent. The unfairness and opacity of Meta's new privacy policy (e.g., misleading regarding the "free" offer) as well as the fact that no real choice is provided to the consumers but to be tracked and profiled are likely to amount to an infringement of the GDPR's consent rules. Meta's practice may therefore constitute both an illegal data processing practice under the GDPR and prohibited unfair commercial practice under the UCPD.

In this respect, the UCPD Guidance provides:

(...) Such data protection violations should be considered when assessing the overall unfairness of commercial practices under the UCPD, particularly in the situation where the trader processes consumer data in violation of data protection requirements, i.e., for direct marketing purposes or any other commercial purposes like profiling, personal pricing or big data applications.

From a UCPD perspective, the first issue to be considered concerns the transparency of the commercial practice.²⁵

The likelihood that Meta's practices are in breach of other legislation that protect consumers fundamental rights to privacy and personal data protection and the GDPR's principles and data subject's right must be considered *per se* as potential breaches of the EU rules prohibiting unfair commercial practices.

²¹ www.wired.co.uk/article/meta-facebook-pay-for-privacy-europe

²² To paraphrase the words used by US Senator Warren in a letter to the US Federal Communications Commission Chairman in June 2016 [2016-06-21_Letter_to_FCC_re_Privacy_Rulemaking.pdf](https://www.senate.gov/imo/media/doc/letter/2016/2016-06-21_Letter_to_FCC_re_Privacy_Rulemaking.pdf) (senate.gov).

²³ See reaction from the Norwegian data protection authority above. Danish data protection authority is also investigating the matter: <https://www.datatilsynet.dk/international/internationalt-nyt/2023/nov/datatilsynet-foelger-udviklingen-i-metas-nye-betalingsmodel>

²⁴ <https://noyb.eu/en/noyb-files-gdpr-complaint-against-meta-over-pay-or-okay> (last consulted: November 2023)

²⁵ Commission Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market.

Such new business practice contributes to turn privacy into a “tradable product” with a risk of worrying consequences for the future of the platform economy and consumers’ wellbeing.

Meta is one of the first major bigtech players turning to such new paid schemes for its users. Others - like for instance TikTok - may follow in a near future.²⁶ This move towards privacy-as-a-service is also likely to get more importance in a near future. For example, since the beginning of 2023, Meta has been trying out a new subscription plan in Australia and New Zealand where consumers can pay to have access to better protection from impersonation or better access to customer support when users experience problems with their accounts.²⁷ This will have very important consequences for consumers’ wellbeing when using such services and for the personal data economy.



4. A call for a coordinated action of the CPC-Network

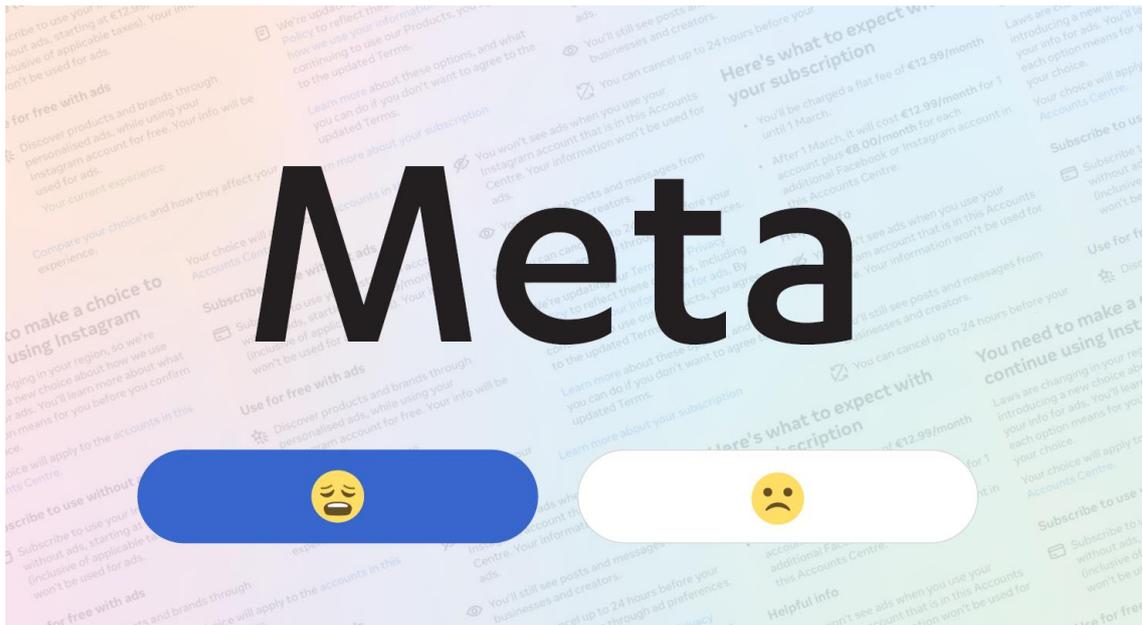
For the reasons set out in this legal assessment, we call on the CPC-Network to:

- **Start a coordinated enforcement action to undertake the necessary enforcement measures for the cessation and prohibition of Meta’s illegal practice.**
- **Publish a joint position. This step is essential not only to enforce the law against the concerned traders but also to provide a clear signal and guidance to the whole sector about the misleading and aggressive nature of this practice.**

²⁶ <https://techcrunch.com/2023/10/02/tiktok-begins-testing-4-99-ad-free-subscription-tier/>

²⁷ techcrunch.com/2023/02/24/meta-verified-is-rolling-out-to-users-in-australia-and-new-zealand/;

www.theguardian.com/technology/2023/feb/20/facebook-instagram-paid-for-signal-free-access-meta (last consulted November 2023).



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