COMPLAINT TO [SUPERVISORY AUTHORITY] UNDER ARTICLE 77(1) OF THE EUROPEAN GENERAL DATA PROTECTION REGULATION[1]

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

A.   Summary of complaint

1.   The Complainant is a user of [a] platform[s] provided by Meta. This complaint relates to Meta's processing of the Complainant's data, both before and since Meta introduced a requirement to either consent to certain processing or opt into a paid subscription from Meta.

2.   Meta processes the Complainant's data at significant scale to generate a continuously updated profile of [his]/[her] known and inferred characteristics and interests. That profile is said by Meta to be used for two notable purposes: 'ad personalisation' and 'personalisation of [Meta's] services' (i.e. content other than ads). Those purposes rely respectively on the legal bases of consent and contract. The new paid subscription model allows 'ad personalisation' to be 'switched off' in return for payment of a fee.

3.   Key terms used by Meta render the precise meaning of these purpose categories unclear. Further:

    i.   What tools Meta provides to the Complainant to understand its profiling are limited and do not appear to explain Meta's profiling in full; and

    ii.   It appears that even when 'ad personalisation' is 'switched off', users continue to receive some content which is targeted advertisements in all but name.

4.   Union courts and supervisory authorities have assessed Meta's processing of personal data for behavioural advertising before: they have ruled out its reliance on either contract or legitimate interests under the GDPR, prompting Meta's attempt in November 2023 to rely on consent for its 'ad personalisation'. Importantly, however, such 'behavioural advertising processing' – a phrase used by and considered by courts and authorities – overlaps with *both* 'ad personalisation' and 'personalisation of the service' in the sense Meta uses these terms. In other words, Meta uses disjoined terms for what the CJEU and supervisory authorities consider a single purpose: behavioural advertising.

5.   Meta has therefore unlawfully processed the Complainant's personal data for (at least) the following reasons:

    i.   Meta's 'ad personalisation' lacks a valid legal basis because it relies on consent which has not been validly collected for the purposes of the GDPR;

    ii.   Some of Meta's 'personalisation of the service(s)' appears to be behavioural advertising processing, and relies invalidly on contract;

    iii.   Meta cannot account for the lawfulness of its other 'personalisation of the service(s)' processing since it is not clear – and there is no way to verify – that all

of Meta's Profiling for that purpose is (a) *necessary* for the relevant contract and (b) consistent with the principle of data minimisation;

iv. It is not clear – and there is no way to verify – that all of Meta's profiling for 'ad personalisation' is necessary for that purpose and therefore consistent with the principle of data minimisation;

v. Meta's processing in general is not consistent with the principles of transparency and purpose limitation; and

vi. Meta's lack of transparency, unexpected processing, use of its dominant position to force consent, and switching of legal bases in ways which frustrate the exercise of data subject rights, are not consistent with the principle of fairness.

6. Bearing in mind the fundamental nature of the rights engaged and the need for "effective and complete" protection of data subjects, the Complainant asks [SUPERVISORY AUTHORITY] to investigate these matters fully and take appropriate regulatory action. The action that the Complaint considers appropriate to respond to this complaint is set out at section E.

B. **Introduction and background**

7. The Complainant is [NAME]. [He]/[She] has [a/n] [Facebook] [and] [Instagram] account[s], which he opened in [INSERT YEAR] [and [INSERT YEAR] respectively]. The Complainant is domiciled in [MEMBER STATE].

8. Meta Platforms Ireland Limited ('**Meta**') operates the Facebook and Instagram platforms in the European Union and is the data controller (within the meaning of Article 4 GDPR) for the processing of the Complainant's personal data arising from [his]/[her] use of [that]/[those] platform[s].

9. The Complainant brings this Complaint in relation to the processing by Meta of [his]/[her] personal data in connection with [his]/[her] Facebook] [and] [Instagram] account[s] since 3 November 2023, when Meta introduced a consent vs. paid subscription model, under which the Complainant was required to give 'consent' to some of Meta's processing unless [he]/[she] opted into a paid subscription for some Meta services. The Complainant did not opt into that paid subscription.

C. **Meta's processing of the Complainant's personal data and purported collection of the Complainant's consent**

I. <u>Meta's profiling of the Complainant and two of its purposes which rely on that profiling.</u>

10. Meta processes the personal data of the Complainant within the meaning of Article 4(1)-(2) of the GDPR, including by profiling [him]/[her] within the meaning of Article 4(4) of the GDPR.

11. An analysis of the lawfulness of Meta's pay-or-consent model depends on an understanding of Meta's profiling, the purposes of that profiling, and how those purposes relate to the legally relevant concept of behavioural advertising processing. In this section C the following terms, used throughout this Complaint, are explained:

    i. **Profiling**: all of Meta's processing to generate metrics and inferences about the data subjects' characteristics, use of Meta platforms, interests, (predicted) interaction with advertisements and other content, and other on and offline behaviour.

    ii. '**ad personalisation**': A term used by Meta, which it says describes its profiling for the purpose of ad personalisation and (since 3 November 2023) in reliance on Article 6(1)(a) (consent). This is set out in the section of the Meta Privacy Notice (at Annex 1) headed *'Personalizing ads on the Meta Products'*.

    iii. '**personalisation of the service(s)**': A further term used by Meta, which it says describes profiling conducted for the purpose of personalisation of the service(s), in reliance on Article 6(1)(b) (contract). This is set out in the section of the Meta Privacy Notice headed '*Personalising the Meta Products (other than ads)*'.

    iv. **Behavioural Advertising Processing**: Profiling and related processing by Meta for the purposes of targeting advertisements of any kind, as considered (inter alia) in decisions of Union supervisory authorities and courts listed at paragraph 44 below, *whether or not included* in Meta's category of 'ad personalisation'.

    a) Meta continuously profiles the Complainant

12. According to its Privacy Notice, Meta collects a wide range of personal data about the Complainant. Over 18 broad categories of data are named, which (paraphrasing) include:

    • The Complainant's actions on Meta platforms (such as creating, viewing, liking and sharing content, sending messages and the time spent in doing those things), and those of the Complainant's friends and followers;

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- Information about the device(s) used by the Complainant to access Meta platforms;

- The Complainant's location over time, whether using GPS or through inference based on the Complainant's IP address;

- Information about the Complainant's browsing off Meta's products, such as sites visited and purchases made, including through the use of unique identifiers such as cookies[2].

13. Meta's Privacy Notice states that it "*use[s] your information* [i.e. the categories of data listed above] *to understand your interests and your preferences."* Meta also offers users a 'download your information' tool and, for non-paying users, access to '*Ad Topics*' through their profile settings which show some of the metrics which Meta has generated about a user[3]. Taken together, this shows that Meta's processing uses the data it collects about the Complainant – across multiple Meta platforms and indeed off those platforms – to:

   i.   generate metrics and inferences regarding the personal characteristics, traits, activities, and interests of the Complainant; and

   ii. Create a profile of the Complainant's known or inferred characteristics, traits, activities, and interests.

14. That 'profile' appears to be continuously updated. Meta's information for advertisers[4] states:

   "Each time an ad is shown, our ads delivery system learns more about the best people and places to show the ad. [...] The more an ad is shown, the better the delivery system becomes at optimizing the ad's performance."

15. That is, there is a continuous process of profiling each user – including the Complainant.

16. The Complainant has used Meta's 'download your information' tool, which shows that Meta's processing involves the generation of metrics/profile aspects such as:

   - A list of people with whom the Complainant has recently interacted, inferred to be 'friends' of the Complainant;

   - A list of recently viewed content and advertisements on Meta's platforms; and

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[2] The Complainant understands that Meta offers specific user controls in relation to its use of '*information from third party websites and apps'* to target advertising, but this does not affect the analysis in this Complaint since, whether or not Meta has used information from third parties, it has profiled and continues to profile the Complainant for the purposes of targeting behavioural advertising.
[3] See Annex 2, Images 2 and 3.
[4] https://www.facebook.com/government-nonprofits/blog/driving-optimization-with-machine-learning

- A 'primary' location inferred from IP address and device information.

17. Separately, Meta allows the Complainant to view [his]/[her] 'Ad Topics'; a list of issues which Meta infers are relevant or of interest to the Complainant.[5]

18. This collection of personal data, further processing to generate inferences, and building of a continuously updated profile of the Complainant is referred to collectively in this Complaint as Meta's **'Profiling'** (as noted at para 11).

b) *The same profiling is used for different purposes*

19. According to Meta's Privacy Notice, Meta's Profiling is conducted for (at least) two purposes of note to this Complaint. These are categorised/defined by Meta as follows:

i. '**Personalising ads**': Meta uses its Profiling to "to personalize [the Complainant's] ads and measure how those ads perform" and to "understand [the Complainant's] interests and [the Complainant's] preferences and provide [them] personalized ads across the Meta Products". That is, Meta targets advertisements (and allows advertisers to do the same) at the Complainant by reference to known or inferred characteristics, traits, activities, and interests. Meta purports to rely on Article 6(1)(a) (consent)[6] as the legal basis for this processing purpose. In this Complaint Meta's Profiling for this purpose is referred to as '**ad personalisation**'[7].

ii. '**Personalising the Meta Products**': Meta uses its Profiling to "assess and understand [the Complainant's] interests [and] preferences and provide [the Complainant] with personalised experiences across the Meta Products". This includes personalising the content which appears in the Facebook and/or Instagram feeds, and suggesting individuals, groups and events which are inferred to be of relevance or interest to the Complainant. Meta purports to rely on Article 6(1)(b) (necessity for the performance of a contract) for this processing purpose. In this Complaint Meta's Profiling for this purpose is referred to as '**personalisation of the service(s)**'.

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[5] These are the readily available tools through which Meta purports to comply with its obligations to provide the Complaint with access to copies of the Complainant's data undergoing processing, and transparency about that processing. It is not accepted that these tools provide a comprehensive understanding of Meta's processing nor full copies of the Complainant's data undergoing processing. The full extent of Meta's processing and its purposes is unknown to the Complainant. The Complainant also notes that Meta has frequently changed and updated the tools which it makes available, adding to the lack of clarity about its processing. See Annex 2 for examples.

[6] Hereafter references to Articles are to Articles of the GDPR unless otherwise stated.

[7] We use slightly different terminology for ease of reading, but each of our terms 'ad personalisation' and 'personalisation of the service(s)' correspond exactly to the named sections of Meta's Privacy Notice respectively.

20. Meta's Profiling is carried out for both purposes, and both purposes rely on '*personalisation*'. This is underlined by the fact that <u>exactly the same</u> categories of personal data are listed in the sections of Meta's Privacy Notice referring to these two (purportedly distinct) purposes. Figure 1 below illustrates this. By necessity, this is a simplified and stylised representation of Meta's processing, but it shows that one set of processing operations is used to build a profile, which is then used by Meta for two purposes. The Profiling is the same, but the purposes are different. Importantly, Meta relies on different legal bases for the two purposes.

Figure 1: Meta's Profiling and the purposes it supports
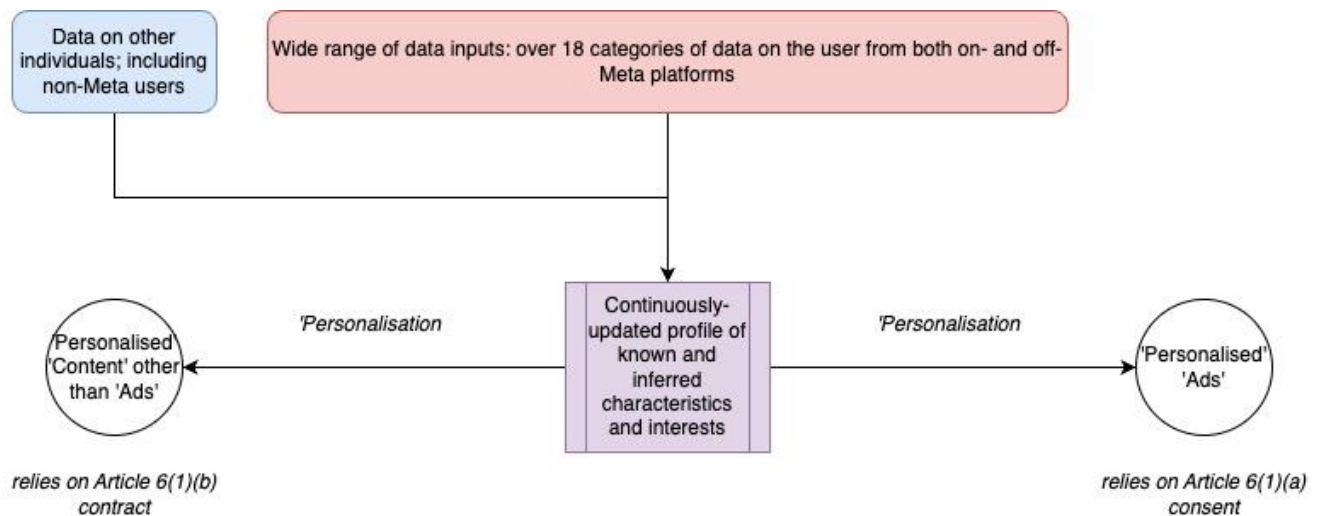
c) *Meta's new paid subscription model allows 'ad personalisation' to be 'switched off' in return for payment*

21. Meta's two purpose categories – 'ad personalisation' and 'personalisation of the service(s)' are of particular relevance to this complaint because of the different legal bases relied on, and their relationship to Meta's new paid subscription model.

22. Meta has previously relied on the legal bases in Articles 6(1)(b) and (f) respectively for 'ad personalisation'. That reliance has been invalidated by, notably, Urgent Binding Decision 01/2023 of the EDPB.

23. On 1 August 2023, Meta announced its intention to rely on Article 6(1)(a) (consent) for 'ad personalisation'[8]. On 30 October 2023 Meta announced[9] that this would be accompanied by the new paid subscription model:

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[8] https://about.fb.com/news/2023/01/how-meta-uses-legal-bases-for-processing-ads-in-the-eu/
[9] https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/

"[W]e will be offering people who use Facebook or Instagram and reside in [the Union] the choice to continue using these personalised services for free with ads, or subscribe to stop seeing ads. While people are subscribed, their information will not be used for ads."

24. In a later update[10] Meta reiterated and expanded:

"If a person chooses to subscribe [i.e. pay], they won't see ads and we will not process their information for personalised advertising […] We introduced this choice, called 'Subscription for no ads', as our consent solution to comply with a unique combination of connected and sometimes overlapping EU regulatory obligations with differing compliance deadlines."

25. At some time after 3 November 2023, the Complainant, on logging into [his]/[her] [Facebook]/[Instagram] account[s], was presented with a notice describing Meta's paid subscription/consent offer and requiring [him]/[her] to either opt into a paid subscription or 'consent' to certain processing by Meta. The Complainant selected the option marked 'Use for free with ads'[11]. The Complainant understands that by doing so, [he/she] was taken by Meta to have consented – for the purposes of Article 6(1)(a) GDPR – to 'ad personalisation'.

26. Based on Meta's statements quoted above, the Complainant broadly understands that, as a result of refusing the paid subscription, Meta continued 'ad personalisation' in relation to [his]/[her] personal data. Conversely, had the Complainant opted into the paid subscription:

i. The Complainant would have ceased to '*receive ads*', with the term '*ads*' not having been publicly defined by Meta; and

ii. Meta would no longer 'use' or 'process' [the Complainant's] information for 'personalised advertising'.

27. That is – as shown in Figures 2 and 3 – if the Complainant opted for the paid subscription, Meta would no longer carry out Profiling for the purpose of 'ad personalisation'. Regardless of the Complainant's choice however, 'personalisation of the service(s)' would continue to take place, since, according to its Privacy Notice, Meta relies on Article 6(1)(b) (contract) and not consent for that processing. It is a *purpose* of Profiling which may be 'switched off' by opting into the paid subscription, but not the

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[10] Ibid
[11] See Annex 2, Image 1

Profiling itself, which will continue to be conducted for other purposes and in reliance on other legal bases.

Figure 2: Meta's profiling of a user who has opted into the paid subscription
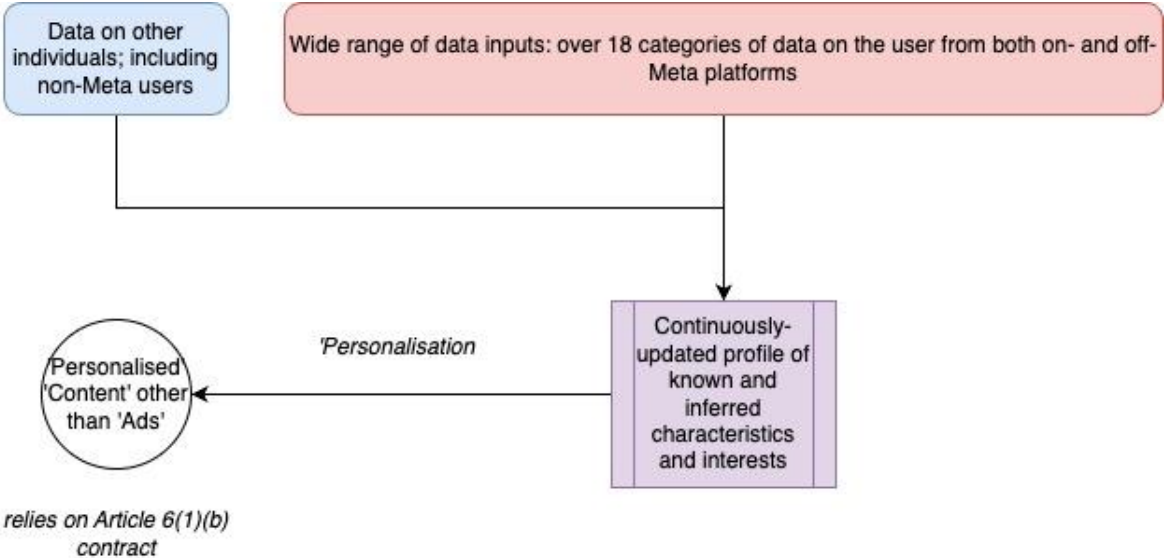
Figure 3: Comparison of the Complainant and a paying user
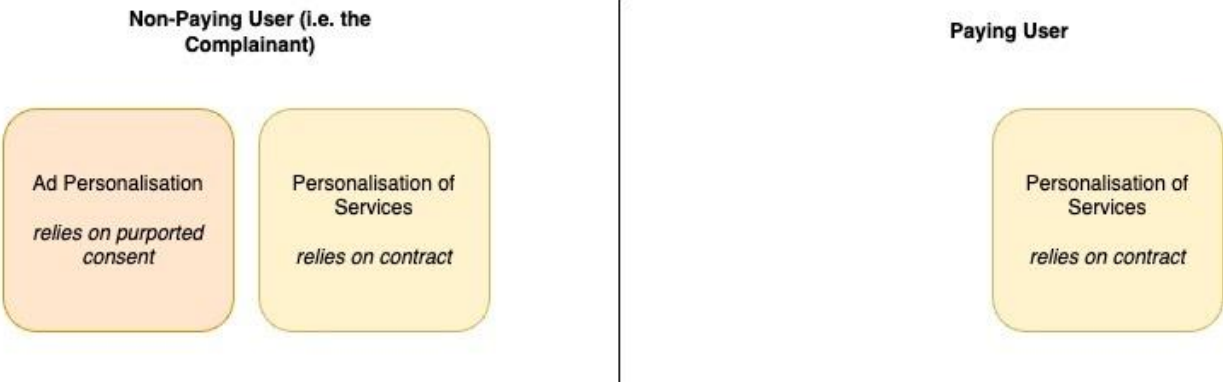
28.   However, as set out in the following sections, the full and precise effect of opting into or out of the paid subscription was not and is not clear to the Complainant. It is unknown (and unknowable except to Meta) precisely how the Complainant's choice (would have) affected the underlying processing of the Complainant's personal data. Thus, the Complainant is concerned that Profiling for behavioural advertising would continue unabated, and that the choice offered to the Complainant is therefore confusing and illusory.

a)   Meaning of terms used by Meta is not clear

29.   The terms '*personalisation*', '*ads*', and '*personalised experiences*' used above are all taken from Meta's Privacy Notice. The meanings of these terms are unclear.

30.   The terms 'ads' and 'advertisements' (and by extension, the processing that relates to them) are not defined by Meta in its Privacy Notice or elsewhere. In particular, the implication that '*personalised experiences*' (i.e. what is targeted through 'personalisation of the service(s)') excludes advertisements appears to be undermined by the content which is in fact delivered to users.

31.   'Personalisation of the services' determines the groups, posts and other suggestions presented to the Complainant. In information presented to the Complainant, Meta indicates that this 'personalisation of the service(s)' extends to '*posts and messages from businesses and creators*'[12]. Meta permits such posts to be 'sponsored' by businesses and creators for payment. It follows that even were the Complainant to opt into the paid subscription, [he]/[she] could still receive content such as:

    i.   Suggested posts from businesses inferred to be of interest or relevance to the Complainant in the Facebook news feed; and/or

    ii.   Suggested posts from influencers promoting products on a paid-for basis in the Instagram feed[13].

32.   These examples are illustrative only and are not intended to convey the full scope for promoted and paid content to be targeted at users on the basis of 'personalisation of the service(s)'. Given the complexity of Meta's products and the frequency with which their design changes, that full scope is not known to the Complainant.

33.   That content constitutes 'ads' on an ordinary interpretation of the word, contradicting Meta's statement that the Complainant would no longer '*receive ads'* and rendering the scope of 'ad personalisation' vs. 'personalisation of the service(s)' unclear to the Complainant.

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[12] Annex 2, Image 5. See further in Meta's Privacy Notice section related to 'personalisation of the service(s)': "If you've recently engaged with a certain topic on Facebook, we might then suggest other posts that are related to that topic. So if you recently liked or commented on a post from a basketball Page, we could suggest other posts about basketball. […] You might see posts based on where you are and what people near you are interacting with on Facebook. So if you're near a sports stadium, we can suggest games or events occurring at the stadium."

[13]   The   Complainant   is   aware   of   research   documenting   this   issue,   see   e.g. https://www.wsj.com/tech/personal-tech/i-paid-14-for-a-month-of-ad-free-instagramwas-it-worth-it-bd098391.

34. The term 'personalisation' (and the processing related to it) is likewise undefined and unclear. In its Privacy Notice, Meta implies that this is about what is interesting to a user: "*we want everything you see to be interesting and useful to you, so we personalize ads for you.*"

35. When providing information to advertisers, however,[14] Meta's characterisation of 'personalisation' focuses more on the performance of advertisements:

   "Machine learning helps show the right ad to the right audience by using predictive analytics and algorithms. It helps improve ad performance by shifting spend wherever the system is likely to achieve the best results based on your campaign goals. This is known as liquidity […] Each time an ad is shown, our ads delivery system learns more about the best people and places to show the ad. The more an ad is shown, the better the delivery system becomes at optimizing the ad's performance."

36. Thus 'personalisation' – especially 'ad personalisation' appears to be more a question of optimising for advertisers' goals as opposed to maximising how 'interesting' content is to a user like the Complainant. Rather than 'personalisation', a more appropriate word might be 'targeting'.

   b) *Meta's processing appears to be more complex and extensive than represented to the Complainant*

37. The 'download your information' tool and 'Ad Topics' present a relatively limited and static picture of Meta's profiling of the Complainant. This is at odds with Meta's description quoted above of the use of machine learning to continuously update the Complainant's Profile each time an ad is shown. Other statements by Meta to advertisers likewise suggest that its processing offers advertisers targeting which is substantially more complex than that suggested by the static list of 'Ad Topics' presented to the Complainant. These statements describe how Meta's targeting algorithms 'leverage information such as demographics, interests and behaviors',[15] create 'predictions of each ad's relevance for the particular person',[16] works by '[combining] data and Facebook activity to predict who the right people are for your products and services [...] and answers this question billions of times per day', and should be '[allowed] to figure out for itself [...] who to best target, and allowing for all of your data to flow together

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[14] https://www.facebook.com/government-nonprofits/blog/driving-optimization-with-machine-learning
[15] https://www.facebook.com/business/help/164749007013531?id=401668390442328
[16] https://www.facebook.com/business/help/1000688343301256?id=561906377587030

instead of segmenting it, means that the algorithms can use all of the learning, all of the patterns, all of the feedback together, to make the campaign perform better.'[17]

38. The experience of other Meta users – of which the Complainant has been made aware – underlines this. Annexed[18] is an example, from February 2024, of an advertisement for gym membership. Meta provides the following reasons for the ad being shown:

    i.   Interaction with ads about furniture, security & privacy and animal welfare;

    ii.   Posts about comedy; and

    iii.   "*Sometimes activity appears unrelated to the ad you see. This may happen because we've made a prediction based on others with similar activity.*

39. The 'Ad Topics' for the user shown the ad do not correspond to the reasons given. Indeed, there is no apparent connection between the ad and the reasons given for it being shown. Thus, Meta's Profiling and 'ad personalisation' is more complex and extensive than what is represented to users through 'download your information' and 'Ad Topics', rendering the terms 'personalisation', 'ad personalisation', and 'personalisation of the service(s)' unclear to the Complainant.

III.   <u>Relating Meta's purpose categories to 'Behavioural Advertising Processing' as considered by courts and supervisory authorities</u>

    a)   <u>Previous consideration of Meta's profiling for behavioural advertising by supervisory authorities and courts in the Union</u>

40. Meta's purpose categories of 'ad personalisation' and 'personalisation of the service(s)' are relevant because they define the choice offered to the Complainant when the paid subscription model was presented.

41. However, these categories overlap with the concept of processing for behavioural advertising, as used by *inter alia* the Court of Justice of the European Union ('**CJEU**') and European Data Protection Board ('**EDPB**'). That processing is referred to as 'Behavioural Advertising Processing' herein.

42. Meta's Profiling for the purposes of targeting advertising has been considered by the **EDPB**, supervisory authorities in the Union (notably the Irish Data Protection Commission / *An Coimisiún um Chosaint Sonraí*, (the '**Irish DPC**') and the **CJEU**. For example, in Case C252-21, Meta's profiling for the purposes of targeting advertisements was described by the CJEU (at [27]) as follows:

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[17] https://www.facebook.com/business/inspiration/video/liquidity [video].
[18] Annex 2 Images 6 to 11

"[…] online advertising, which is tailored to the individual users of the social network according, inter alia, to their consumer behaviour, interests, purchasing power and personal situation. Such advertising is made possible in technical terms by the automated production of detailed profiles in respect of the network users and the users of the online services offered at the level of the Meta group. To that end, in addition to the data provided by the users directly when they sign up for the online services concerned, other user- and device-related data are also collected on and off that social network and the online services provided by the Meta group, and linked to their various user accounts. The aggregate view of the data allows detailed conclusions to be drawn about those users' preferences and interests."

43. In Urgent Binding Decision 01/2023[19] the EDPB referenced the Norwegian supervisory authority's shorter description of the same processing (at [10]):

    "behavioural advertising includes any activities where advertising is targeted on the basis of a data subject's behaviour or movements, including advertising based on perceived location"

44. Various decisions of supervisory authorities and courts have considered the lawful basis on which Meta's Profiling for the purpose of targeting advertisements may validly rely. In this Complaint such processing by Meta is referred to as '**Behavioural Advertising Processing**':

    i.   On 5 December 2022, the EDPB issued Binding Decisions 3/2022[20] and 4/2022[21] concerning Meta's Facebook and Instagram platforms. In short, these decisions held that Meta's Behavioural Advertising Processing through those platforms could not validly rely on Article 6(1)(b) (contract). On 31 December 2022 these decisions were adopted by the Irish DPC[22].

    ii. On 30 March 2023, Meta announced that it would carry out Behavioural Advertising Processing in reliance on Article 6(1)(f) (legitimate interests)[23].

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[19] https://edpb.europa.eu/system/files/2023-12/edpb_urgentbindingdecision_202301_no_metaplatformsireland_en_0.pdf
[20] https://edpb.europa.eu/system/files/2023-01/edpb_bindingdecision_202203_ie_sa_meta_facebookservice_redacted_en.pdf
[21] https://edpb.europa.eu/system/files/2023-01/edpb_binding_decision_202204_ie_sa_meta_instagramservice_redacted_en.pdf
[22] https://dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-two-inquiries-meta-ireland
[23] https://about.fb.com/news/2023/01/how-meta-uses-legal-bases-for-processing-ads-in-the-eu/

iii.   In July 2023, the CJEU in Case C252-21 ruled that, in effect, Meta's Behavioural Advertising Processing could not validly rely on Article 6(1)(f) (legitimate interests).

iv.   On 27 October 2023, in Urgent Binding Decision 01/2023, the EDPB ordered the Irish DPC to ban Meta from carrying out Behavioural Advertising Processing in reliance on either Articles 6(1)(b) or (f). That decision was adopted by the Irish DPC on 10 November 2023[24].

45.   In short, it has been established that Meta's Behavioural Advertising Processing may not validly rely on either Article 6(1)(b) or (f) as a legal basis.

   b)   Overlap between Meta's purpose categories and Behavioural Advertising Processing

46.   By changing the legal basis relied on for 'ad personalisation' in response to the decisions listed above, Meta gives the Complainant the impression that 'ad personalisation' and Behavioural Advertising Processing are one and the same. However, whilst it is correct that 'ad personalisation' constitutes Behavioural Advertising Processing, it appears that some of the processing in 'personalisation of the services' also meets that definition:

i.   By its description, all of Meta's 'ad personalisation' meets the definition of Behavioural Advertising Processing[25] as dealt with by the EDPB, Irish DPC and CJEU: it involves '*showing*' and '*personalising*' (i.e. targeting) advertisements based on the Complainant's profile.

ii.   This is supported by Meta's adoption of consent as a lawful basis for this processing explicitly in response to the invalidation of first Article 6(1)(b) and second Article 6(1)(f) as possible legal bases for such processing[26]. By changing its lawful basis for 'ad personalisation' in response to decisions concerning Behavioural Advertising Processing, Meta implicitly accepts that its processing for 'ad personalisation' constitutes Behavioural Advertising Processing.

iii.   However, as described in paras 30 to 33 above, 'personalisation of the service(s)' involves the targeting of at least some content at users which are advertisements in all but name. That targeting also meets the definition of Behavioural Advertising Processing as dealt with by Union courts and supervisory authorities.

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[24] https://edpb.europa.eu/news/news/2023/edpb-publishes-urgent-binding-decision-regarding-meta_en
[25] But for the avoidance of doubt, not all Behavioural Advertising Processing is 'ad personalisation'.
[26]   https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/

47. The fact that Meta categorises its processing in ways which do not precisely correspond to the legally important category of Behavioural Advertising Processing is apt to cause confusion. Figure 4 shows how Behavioural Advertising Processing – processing in respect of which Meta is constrained as to which legal basis it can rely on – overlaps with Meta's processing/purpose categories. In particular it shows that, even where a user opts into a paid subscription model, they may continue to be subject to some Behavioural Advertising Processing under Meta's category of 'personalisation of the service(s)'.

Figure 4: Behavioural Advertising Processing for paying and non-paying users[27]
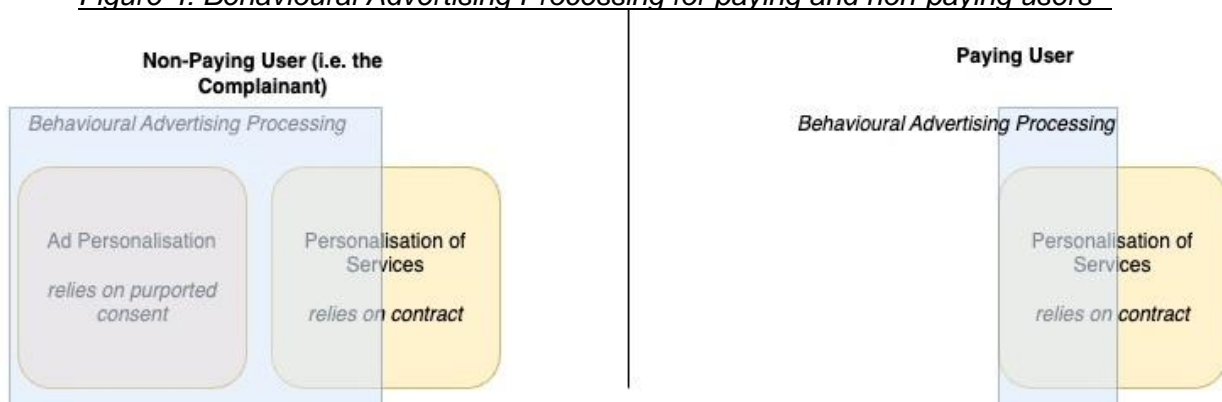
D. **Unlawful processing of the Complainant's personal data**

48. Meta has processed the Complainant's personal data unlawfully in that:

   i.   Meta's 'ad personalisation' is Behavioural Advertising Processing and lacks a valid legal basis, relying as it does on Article 6(1)(a) (consent) which is not valid for the purposes of the GDPR;

   ii. Some of Meta's 'personalisation of the service(s)' appears also to be Behavioural Advertising Processing, and relies invalidly on Article 6(1)(b) (contract);

   iii. Meta cannot account for the lawfulness of its 'personalisation of the service(s) processing which is not Behavioural Advertising Processing, since it is not clear – and there is no way to verify – that all of Meta's Profiling for that purpose is *necessary* for the performance of its contract and consistent with the principle of data minimisation;

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[27] For the avoidance of doubt, this figure is not intended to claim that any particular proportion of 'personalisation of the service(s)' processing constitutes Behavioural Advertising Processing.

iv.   It is not clear – and there is no way to verify – that all of Meta's Profiling for 'ad personalisation' is necessary for that purpose and therefore consistent with the principle of data minimisation.

v.   Meta's processing in general is not consistent with the principles of transparency and purpose limitation; and

vi.   Meta's lack of transparency, unexpected processing, use of its dominant position to force consent, and switching of legal bases in ways which frustrate the exercise of data subject rights, are not consistent with the principle of fairness[28].

49.   These issues are addressed in turn.

I.   <u>Behavioural Advertising Processing, which relies on purported consent, lacks a valid legal basis</u>

50.   According to its Privacy notice, Meta carries out 'ad personalisation' in respect of the Complainant, which is Behavioural Advertising Processing, in reliance on the consent purportedly collected from the Complainant when [he]/[she] chose not to opt into the paid subscription for Meta services.

51.   Meta's reliance on Article 6(1)(a) (consent) for 'ad personalisation' is invalid. Article 4(11) defines consent as:

> *"any <u>freely given, specific, informed and unambiguous</u> indication of the data subject's wishes by which he or she, by a statement or <u>by a clear affirmative action</u>, signifies agreement to the processing of personal data relating to him or her" (emphasis added)*

52.   Article 7 provides further:

> *"3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. <u>It shall be as easy to withdraw as to give consent</u>.*

> *4. When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service,*

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[28] The Complainant notes that Meta's Behavioural Advertising Processing may also contravene Regulations 2022/2065 (Digital Services Act), and 2022/1965 (Digital Markets Act), and Directive 2005/29/EC (Unfair Commercial Practices) but naturally limits this complaint to contraventions of the GDPR.

is conditional on consent to the processing of personal data that is not necessary for the performance of that contract." (emphasis added)

53. The deficiencies in Meta's attempt to meet these requirements when collecting the Complainant's consent are addressed in turn.

   a) Purported consent is not specific, unambiguous, and informed

54. It is unclear precisely what processing and for what purposes the consent sought from the Complainant related to:

55. **First**, Meta's processing in general is not clear. As explained at paras 29 to 36, key terms in Meta's pay-or-consent model such as 'personalisation' and 'ads' are undefined and lack clarity, preventing the Complainant from being able to understand what [he]/[she] is asked to consent to. Compounding this (paras 37 to 39), what information Meta does provide about its processing does not appear to be a full explanation. Without an understanding of Meta's processing in general, the Complainant cannot understand how to consent or otherwise make a choice about particular parts of it.

56. **Second**, as set out at paragraphs 31 to 33, regardless of the Complainant's choice about 'ad personalisation', sponsored content would continue to be targeted to the Complainant under 'personalisation of the service(s)'. That is Behavioural Advertising Processing will occur in all but name, contradicting Meta's statement that it would no longer '*process the Complainant's information for personalised advertising*'. None of this is made clear by Meta, undermining the '*specificity*' and '*unambiguity*' of the consent sought.

57. **Third**, compounding the lack of clarity outlined above, there is no way for the Complainant to verify what Profiling would cease (if any) were [he]/[she] to opt into the paid subscription, even using the limited tools which Meta makes available to understand part of its Profiling. The Complainant has been made aware of the experience of Meta users who have opted into the paid subscription. They are no longer able to view the 'Ad Topics' assigned to them by Meta[29]. The Complainant understands that Ad Topics are the principal way in which Meta allows data subjects to understand Meta's profiling of them as they show the characteristics and topics which Meta infers are related, relevant or of interest to a data subject[30]. Thus the Complainant cannot know whether, were [he]/[she] to opt into the paid subscription:

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[29] Users receive a message stating 'Because you are no longer seeing ads, you no longer have access to the settings that aren't relevant.'
[30] Annex 2, Image 4

i.   Meta would cease the Profiling involved in generating Ad Topics, relying only on other Profiling to carry out 'personalisation of the service(s)';

ii. Meta would continue to generate *some* Ad Topics, but fewer than for a user opting out of the paid subscription; or

iii. Meta would continue generating Ad Topics to the same extent, but only use them for 'personalisation of the service(s)' (which may include some Behavioural Advertising Processing which Meta does not categorise as 'ad personalisation').

58. In summary, based on Meta's own statements and evidence which the Complainant has been made aware of (i) the nature and extent of Meta's personalisation and Profiling in general is unclear, (ii) an unknown amount of advertising-related Profiling continues regardless of the consent sought by Meta, contrary to its statements, and (iii) there is no way for the Complainant to verify what Profiling (if any) is 'switched off/on' on the basis of the consent sought. It is not clear precisely what processing and for what purposes the consent sought relates to: it cannot be said to be '*specific*' or '*unambiguous*'. For the same reasons, it cannot be said to be '*informed*': the Complainant did not (and could not) understand in full the consequences of withholding or giving the consent, particularly in relation to the central issue of what Behavioural Advertising Processing would cease or continue based on the Complainant's choice.

b)   Purported consent was not freely given

59. The structure of Meta's paid subscription model and the manner of its presentation suggest that the consent sought from the Complainant was not freely given. Case 252-21 (from [143]) addresses whether consent to Meta's Behavioural Advertising Processing may be 'freely given' within the meaning of the GDPR. Bearing in mind that analysis, Meta's dominant position and the way in which it sought consent from the Complainant undermines the validity of that consent:

60. **First**, Meta imposes conditions on users like the Complainant which are not necessary. Article 7(4) provides, when considering whether consent is freely given:

"utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract."

61. This is reinforced by the EDPB's Consent Guidelines[31] which state that "Article 7(4) seeks to ensure that the purpose of personal data processing is not disguised nor

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[31]   Guidelines   05/2020   on   consent   under   Regulation   2016/679:
https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf

bundled with the provision of a contract of a service for which these personal data are not necessary. In doing so, the GDPR ensures that the processing of personal data for which consent is sought cannot become directly or indirectly the counter-performance of a contract"[32].

62. In this case, Meta has made the performance of the contract for the free version of its platforms conditional on 'ad personalisation'. That is, conditional on Behavioural Advertising Processing which has been established – by Case C252-21 and Binding Decisions 3/2022 and 4/2022 – not to be necessary for the performance of that contract. As foreshadowed by the CJEU's concerns in Case C252021 at [149], Meta has indeed imposed "*conditions that are not strictly necessary for the performance of the contract.*"

63. In this regard it is important to note that the CJEU stated at [150] that where consent is sought as a condition of contractual performance by Meta, to comply with Article 7(4):

> *"users [of Meta platforms] are to be offered, **if necessary** for an appropriate fee, an equivalent alternative not accompanied by such data processing operations."* (emphasis added).

64. The CJEU did not elaborate on when the charging of a fee in lieu of consent might be '*necessary*' in this sense, but:

    i.   Where the controller (as Meta does) has a dominant position, the charging of a fee must be shown to be clearly and strictly necessary, to avoid abuse of that dominant position;

    ii.   Where less onerous/intrusive options are available, Meta must demonstrate that charging a fee is in fact 'necessary'. In this regard it is relevant that despite Meta's implied claim[33] that personalising adverts is the only way to provide its service, research for the European Commission[34] has shown that there are less intrusive alternatives to Meta's insistence on Behavioural Advertising Processing or the payment of a fee.

65. **Second,** Meta uses its dominance to offer a consent model which is not sufficiently granular. The CJEU (at [151]) stated:

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[32] At [26].

[33] https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/

[34] https://op.europa.eu/en/publication-detail/-/publication/8b950a43-a141-11ed-b508-01aa75ed71a1/, chapter 5.

"it is appropriate, within the meaning of recital 43, to have the possibility of giving separate consent for the processing of [on-platform] data, on the one hand, and the off-Facebook data, on the other."

66. In the context of the paid subscription model, Meta did not offer the Complainant the ability to give separate consent in this way.

67. **Third**, there is a detriment to withdraw the consent. Article 7(3) states that data subjects should be able to withdraw consent as easily as giving it. The Complainant can only withdraw [his]/[her] 'consent' by navigating the Accounts Centre and opting to pay the subscription amount for the use of Meta Products[35]. The imbalance of ease between consenting and withdrawing suggests the consent sought was not freely given.

68. **Fourth,** the consent was obtained in an unnecessarily disruptive way. Recital 32 to the GDPR states that when consent is obtained through electronic means then "*the request for consent should not be unnecessarily disruptive to the use of the service for which the consent is provided*". As explained in section C.I., Meta introduced a paywall which locked the Complainant out of [his]/[her] account[s]. The Complainant could only gain access by either providing 'consent' or opting into the paid subscription; this was unnecessarily disruptive to the use of the service by the Complainant.

69. Taken together, Meta's dominant position in its market created a clear imbalance of power between Meta and the Complainant. Much in the way foreshadowed by the CJEU in C252-21, that imbalance of power led to a situation in which the Complainant was left with no realistic choice about whether to consent to Meta's 'ad personalisation'. In the words of the CJEU and based on Recital 43 to the GDPR, Meta's dominance fatally undermines the '*freedom of choice of the user [whose consent is sought]*', clearly indicating that the Complainant's consent was not freely given.

70. Pursuant to Article 7[36], Meta must be able to demonstrate that the Complainant consented to the processing of [his]/[her] personal data for 'ad personalisation', which is Behavioural Advertising Processing. This is consistent with the principle of accountability in Article 5(2). Summarising sections D.I.a) and b), Meta cannot demonstrate that the consent sought from the Complainant was:

    i.   specific, unambiguous, informed, because the Complainant cannot understand Meta's processing overall or the impact of giving consent on that processing; nor

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[35] Annex 2, Image 4
[36] And emphasised in C252-21 at [152].

ii. freely given, because of Meta's dominant position and the imbalance of power that creates.

71. Meta's processing in reliance on the purported consent of the Complainant is therefore unlawful.

II. <u>Some Behavioural Advertising Processing impermissibly relies on Article 6(1)(b) GDPR</u>

72. According to Meta's Privacy Notice, 'personalisation of the service(s)' is carried out in reliance on Article 6(1)(b) – i.e. that it is necessary for the performance of Meta's contract with the Complainant.

73. However, as explained at paras 30 to 33 above, 'personalisation of the service(s)' – particularly in combination with the ability for businesses and creators to sponsor posts – can lead to the Complainant receiving content which is personalised advertising in all but name. That is: 'personalisation of the service(s)', despite being categorised separately from 'ad personalisation', involves at least some Behavioural Advertising Processing in relation to the Complainant in reliance on Article 6(1)(b). Pursuant to EDPB Binding Decisions 3/2022 and 4/2022, and to Urgent Binding Decision 01/2023, this is unlawful.

III. <u>Service personalisation processing cannot be demonstrated to have a valid legal basis or respect the principle of data minimisation</u>

74. The Complainant cannot verify what Profiling would continue were [he]/[she] to opt for the paid subscription. Put another way, the Complainant is unable to verify what Profiling Meta carries out under the category of (and for the purpose of) 'personalisation of service(s)' in reliance on Article 6(1)(b) (contract). This is because:

i. Meta does not properly explain its processing: it uses vague undefined terms (paras 29 to 36) and what information it does provide appears not to give a complete picture of its Profiling (paras 37 to 39); and

ii. The *one* tool Meta does provide, '*Ad Topics*' is not provided to paying users, meaning there is no way for a user to verify what Ad Topics (if any) continue to be generated by Meta, and how they are used for 'personalisation of the service(s)'.

75. Indeed, it is possible that Meta makes use of *all* the Ad Topics and other metrics and inferences assigned to the Complainant for *both* the purposes of 'personalisation of the service(s)' *and* for 'ad personalisation'.

76. This is exacerbated by Meta listing precisely the same categories of personal data in the sections of its Privacy Notice dealing with 'ad personalisation' and 'personalisation of

the service(s)' respectively. Leaving aside Ad Topics, the Complainant does not and cannot know to what extent Meta processes [his]/[her] personal data such as GPS, IP address and device information for 'personalisation of the service(s)' as opposed to for 'ad personalisation'. It might be thought that where Meta is *only* carrying out 'personalisation of the service(s)' rather than *both* processing purposes, it would Profile the Complainant less extensively. But there is no way for the Complainant to verify this.

77. Since Meta's processing for 'personalisation of the service(s)' relies on Article 6(1)(b), it must be *necessary* for the performance of its contract with the Complainant. Relatedly, Meta must limit its processing to what is necessary for that purpose, in line with the principle of data minimisation in Article 5(1)(c).

78. These linked questions are discussed at length in Binding Decisions 3/2022 and 4/2022 and Urgent Binding Decision 1/2023 of the EDPB. In Binding Decision 3/2022 the EDPB (re)stated (at [112]):

> *""it is important to determine the exact rationale of the contract, i.e. its substance and fundamental objective, as it is against this that it will be tested whether the data processing is necessary for its performance". As the EDPB has previously stated, regard should be given to the particular aim, purpose, or objective of the service and, for applicability of Article 6(1)(b) GDPR, it is required that the processing is objectively necessary for a purpose and integral to the delivery of that contractual service to the data subject."*

79. That is, what processing is '*necessary*' for the performance of a contract is a fact-specific and objective question. Since the Complainant is not informed about the extent and character of the Profiling Meta conducts for 'personalisation of the service(s)', [he]/[she] has no way of answering that objective and fact-specific question.

80. Indeed there is reason to believe that Meta's processing is *not* necessary in its entirety for the performance of its contract, since the EDPB has in the past (*inter alia* in Binding Decisions 3/2022 and 4/2022) found that Meta misconceives the extent to which its Profiling is genuinely necessary for the performance of its contract with users.

81. In the circumstances, Meta is not in a position to demonstrate to the Complainant that its 'personalisation of the service(s)' processing is necessary for the performance of its contract, as it is required to pursuant to Article 5(2). Without that being demonstrated, Meta lacks a legal basis for at least some of that processing, which is therefore unlawful. For the same reasons, that processing is not in accordance with the principle of data minimisation.

IV. 'Ad personalisation' processing cannot be demonstrated to respect the principle of data minimisation

82. Meta's lawful basis for 'ad personalisation' is Article 6(1)(a) consent. This basis does not have a 'necessity element'. However, the principle of data minimisation in Article 5(1)(c) requires personal data to be "*limited to what is **necessary** in relation to the purposes for which they are processed*" (emphasis added).

83. Thus, the concept of necessity remains relevant to Meta's 'ad personalisation': Meta should only process the Complainant's personal data to the extent necessary to 'personalise' (or more accurately, target) advertisements to [him]/[her] as part of Meta's business. This is reinforced by the EDPB's Guidelines 05/2020 on consent, which state:

"[O]btaining consent also does not negate or in any way diminish the controller's obligations to observe the principles of processing enshrined in the GDPR, especially Article 5 of the GDPR with regard to fairness, necessity and proportionality, as well as data quality. Even if the processing of personal data is based on consent of the data subject, this would not legitimise collection of data, which is not necessary in relation to a specified purpose of processing and be fundamentally unfair."

84. As such, as with Meta's 'personalisation of the service(s)' processing, an objective and fact-specific balancing exercise is required to assess whether Meta is processing only that data which is genuinely necessary to target ads (if that is accepted as a legitimate purpose). Such a balancing exercise is difficult to carry out *in principle* because:

   i. The nature of the purpose of 'ad personalisation' is unclear. Meta describes it very differently when speaking to advertisers/business and data subjects, and key terms are undefined (paras 29 to 36).

   ii. The scale and extent of Meta's processing is unclear. Meta provides few tools to verify the extent of its processing and there is evidence that its processing goes significantly beyond what those tools represent (paras 37 to 39).

85. It is impossible in practice for the Complainant to carry out that balancing exercise *in practice*, because the Complainant has no way of knowing the full extent of Meta's 'ad personalisation' in relation to [him]/[her].

86. What the Complainant *does* know is that:

   i. 'Ad personalisation' is carried out at a significant scale: Meta mentions 18 categories of personal data in its lengthy privacy notice and the scale of the

processing has been noted by the CJEU and EDPB in the decisions listed at para 44; and

ii.   Meta is not openly and fully explaining the scale and nature of its processing (paras 37 to 39).

87.   At a minimum, this creates real doubt about whether Meta's 'ad personalisation' processing is limited to what is necessary for that purpose or, conversely, whether Meta collects as much data about the Complainant as it possibly can, out of any proportion to what could be considered objectively 'necessary' for Meta's business purposes[37].

V.   <u>Breach of the principles of transparency and purpose limitation</u>

a)   <u>*Transparency*</u>

88.   Pursuant to Article 5(1)(a) Meta's processing is required to be transparent. This includes (under Articles 13 and 14) the provision to the Complainant of information regarding:

i.   The purposes of – and legal bases for – Meta's processing; and

ii.   the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

89.   As set out at length in this Complaint (paras 29 to 39, 46 to 47, and 54 to 58), there is a considerable lack of clarity about these matters. At a basic level, crucial aspects of Meta's transparency information rely on its (undisclosed) definition of 'ads', especially in circumstances where courts and supervisory authorities in the Union have issued decisions focused on Behavioural Advertising Processing. This issue is exacerbated by evidence that those who have opted into a paid subscription in order *not* to receive ads, appear to continue to receive content which is personalised advertising in all but name.

90.   Further, the information provided by Meta does not clarify to what extent its Profiling is used for either/both of 'ad personalisation' or 'personalisation of the service(s)'. That lack of clarity has become particularly acute now that Meta purports to rely on consent for 'ad personalisation'. Meta purports to have given the Complainant the opportunity to 'switch off' 'ad personalisation', but without the Complainant being able to know what *processing* (if any) would be affected by [his]/[her] choice.

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[37] In this regard the alternatives to personalised advertising mentioned at para 64 are relevant.

91. In the circumstances, Meta's 'ad personalisation' and 'personalisation of the service(s)' cannot be said to be transparent as required by the GDPR.

   b) Purpose limitation

92. Article 5(1)(b) requires that personal data be:

   "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes […]"

93. Considering Meta's lack of transparency about its processing (set out in the previous section), its purposes cannot be said to 'explicit'. On the contrary they are vague and defined in a way which makes sense only to Meta.

94. Further, Meta's Privacy Notice lists a wide range of vague and potentially overlapping purposes. It explains that all these purposes draw on the same (extensive) pool of personal data and complex profiling operations. Bearing in mind that the Complainant is not able to know what processing is taking place in its totality, let alone with respect to each purpose, Meta cannot be said to collect the Complainant's data for 'specified' purposes. On the contrary, Meta arrogates to itself the right to collect *all* of the Complainant's online personal data (almost without practical limitation) for *all* of its purposes.

95. This is exacerbated by the choice purportedly offered to the Complainant to 'switch off' Profiling for one purpose ('ad personalisation') but without giving the Complainant any means to verify that the Profiling, which would continue if [he]/[she] did make that choice, is genuinely necessary for the remaining purpose ('personalisation of the service(s)').

96. As with other data protection principles, Meta bears the burden of demonstrating its compliance with Article 5(1)(b) in accordance with the principle of accountability in Article 5(2). It cannot do so: such extensive processing, so vaguely described and for so many overlapping purposes, cannot be in accordance with this principle.

VI. Processing is not fair

97. Pursuant to Article 5(1)(a), Meta's processing is required to be fair. In Binding Decision 03/2022 the EDPB (at [219]) stated that fairness is "*distinct but intrinsically linked*" to transparency and lawfulness, and:

   "[I]n data protection law, the concept of fairness stems from the EU Charter of Fundamental Rights. The EDPB has already provided some elements as to the meaning and effect of the principle of fairness in the context of processing personal data. For example, the EDPB has previously opined in its Guidelines on Data

Protection by Design and by Default that "Fairness is an overarching principle which requires that personal data should not be processed in a way that is unjustifiably detrimental, unlawfully discriminatory, unexpected or misleading to the data subject.

Among the key fairness elements that controllers should consider in this regard, the EDPB has mentioned autonomy of the data subjects, data subjects' expectation, power balance, avoidance of deception, ethical and truthful processing.

98. The EDPB in that Decision found those issues "*particularly relevant*" to Meta's Behavioural Advertising Processing.

99. The seeking of the Complainant's consent and consequent processing of [his]/[her] personal data since November 2023 has contravened the principle of fairness (and was therefore unlawful) in that:

    i.   Meta's lack of transparency and switching of legal bases frustrates the exercise of data subject rights;

    ii. Meta's processing goes beyond what its users – including the Complainant – would reasonably expect;

    iii. Meta's seeking of the Complainant's consent was characterised by dark patterns and underpinned by an unacceptable power imbalance between controller and data subject; and

    iv. Meta's processing in these circumstances cannot be said to be '*ethical and truthful*'.

        a) <u>Lack of transparency and switching legal bases</u>

100. As set out at length above, Meta's processing is not sufficiently transparent. By itself, this undermines the fairness of the processing, since:

    "lack of transparency can make it almost impossible in practice for the data subjects to exercise an informed choice over the use of their data."[38]

101. The inability of the Complainant to know in full the consequences of the choice offered to [him/her] regarding '*ad personalisation*' is of particular relevance. There are similarities with the EDPB's earlier findings about Meta's processing[39]:

    "The EDPB notes that in this particular case the breach of Meta IE's transparency obligations is of such gravity that it clearly impacts the reasonable expectations of the

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[38] Binding Decision 03/2022 at [223]
[39] *Ibid* at [226] and [229]

Facebook users by confusing them on whether clicking the "Accept" button results in giving their consent to the processing of their personal data […]

the processing by Meta IE cannot be regarded as ethical and truthful because it is confusing with regard to the type of data processed, the legal basis and the purpose of the processing, which ultimately restricts the Facebook users' possibility to exercise their data subjects' rights."

102. Meta's lack of transparency at the present time is exacerbated by the fact that Meta has changed the legal basis it relies on for 'ad personalisation' twice within one year. At [104] in Binding Decision 03/2022, the EDPB stated:

"there is no hierarchy between these legal bases, However, this does not mean that a controller, as Meta IE in the present case, has absolute discretion to choose the legal basis that suits better its commercial interests. The controller may only rely on one of the legal basis established under Article 6 GDPR if it is appropriate for the processing at stake. A specific legal basis will be appropriate insofar as the processing can meet its requirements set by the GDPR and fulfil the objective of the GDPR to protect the rights and freedoms of natural persons and in particular their right to the protection of personal data."

103. Rapid switching of legal bases is not within data subjects' expectations and makes it difficult for them to know how to exercise their rights, which are tied to legal basis relied on. Indeed, the Complainant is aware[40] that Meta has informed users who had previously objected (when Meta was relying on its legitimate interests) to Behavioural Advertising Processing - a choice with no financial implications - that they would now have to make a '*new choice':* one which comes with a considerable financial cost attached. In this sense, Meta's switching of legal bases can be seen to undermine the exercise of important data subject rights, which it encourages data subjects to trade away in return for avoiding a monthly fee.

104. Data subjects using Meta's platforms have moved from a situation in which Meta was required to balance its interests against those of data subjects to one where the same processing continues but without any balancing of interests, and without data subjects being given a genuine choice about the processing (paras 59 to 71). Meta's Behavioural Advertising processing has been held not to pass the balancing test for reliance on legitimate interests:

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[40] Annex 3

"the interests and fundamental rights of data subjects override the legitimate interests put forward by Meta IE for the processing of personal data collected on Meta's products for the purposes of behavioural advertising."[41]

105. It is submitted that it cannot be right (indeed, cannot be 'fair' within the meaning of the GDPR) that such processing which failed the Article 6(1)(f) balancing exercise so clearly can be made lawful by being imposed on data subjects through a consent process which does not meet GDPR standards.

106. Taken together, Meta's current lack of transparency and shifting of legal basis over time, far from facilitating the exercise of data subject rights (as required by Article 12(2)), has the effect of frustrating the exercise of those rights, making Meta's processing unfair.

   b) *Processing is not within users' reasonable expectations*

107. For similar reasons, Meta's processing is not within data subjects' (including the Complainant's) reasonable expectations. As well as the general lack of clarity about Meta's processing, through its subscription model Meta suggests that users can 'switch off' elements of its Profiling: a reasonable user would expect that Profiling for 'personalisation of the service(s)' is less extensive than for both that and 'ad personalisation'. But it is not clear that opting into the paid subscription has **any** effect to reduce the extent of Meta's Profile of a user. Indeed, there is evidence (see paras 55 to 58) that directly contradicts Meta's statements about the effect of the choice. Meta's processing under the category of 'personalisation of the service(s)' therefore goes beyond what a reasonable user would expect and is not fair.

108. Meta's processing in general is also not within users' expectations due to its scale (as noted by the EDPB and CJEU). Certainly, the information provided by Meta does not bring its processing within users' expectations since that information is incomplete and unclear.

   c) *Collection of purported but invalid consent and imbalance of power*

109. As described in section C, Meta presented the Complainant with a forced consent-collection process, failing which [he]/[she] would have to pay a pre-set financial cost. The Complainant's consent was sought in a situation characterised by significant power imbalance, recalling the EDPB's previous statement about the fairness of Meta's processing which criticised "*the imbalanced nature of the relationship between Meta IE and the Facebook users*" and noted:

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[41] EDPB Urgent Binding Decision 01/2023 at [147]

"The combination of factors, such as the asymmetry of the information created by Meta IE with regard to Facebook service users, combined with the "take it or leave it" situation that they are faced with due to the lack of alternative services in the market and the lack of options allowing them to adjust or opt out from a particular processing under the contract with Meta IE, systematically disadvantages Facebook service users, limits their control over the processing of their personal data and undermines the exercise of their rights under Chapter III of the GDPR." (emphasis added).

110. The choice was accompanied by ambiguous information (such as the loose definition of 'ads' and the lack of clarity about the impact of the choice on the extent of Meta's underlying Profiling). This meets the definition of the dark pattern described by the EDPB in its guidance[42] of "**left in the dark**: *an interface is designed in a way to hide information or data protection control tools or to leave users unsure of how their data is processed and what kind of control they might have over it regarding the exercise of their rights."*

111. Taken together, the power imbalance and dark patterns involved in the attempt to obtain the Complainant's consent contravened the fairness principle.

    d) *Processing cannot be said to be 'ethical and truthful'*

112. Bearing in mind Meta's

    i.   Lack of openness about the scale and nature of its processing (paras 29 to 39);

    ii.   Presentation of an unclear and likely confusing choice to users on an issue which significantly effects them and which has received extensive regulatory attention (paras 54 to 58);

    iii. Use of its dominant position to attempt to extract consent to processing from users which cannot be said to be freely given (paras 59 to 71);

    iv.   Continued Behavioural Advertising Processing in reliance on Article 6(1)(b) despite this being invalidated by the EDPB (paras 72 to 73); and

    v.   Switching of legal bases in a way which frustrates the exercise and enjoyment of data subjects' rights and protections (paras 103 to 105),

    Its processing cannot be said to be '*ethical and truthful*' and must therefore be unfair.

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[42] https://edpb.europa.eu/system/files/2022-03/edpb_03-2022_guidelines_on_dark_patterns_in_social_media_platform_interfaces_en.pdf

E. Requests to [Supervisory Authority]

113. The GDPR protects fundamental rights and freedoms of natural persons (Article 1(2)). The contraventions of the GDPR outlined in this complaint are therefore significant and the Complainant accordingly requests that [SUPERVISORY AUTHORITY] fully investigates the concerns raised in this Complaint using all the powers vested in it under Article 58 of the GDPR and, if appropriate and to the extent that cross border data processing might be involved, that it brings this Complaint to the attention of the European Data Protection Board.

114. In particular, we request that the [SUPERVISORY AUTHORITY] investigates and determines, in relation to the Complainant's personal data and more widely if the [SUPERVISORY AUTHORITY] considers it appropriate, whether:

    i.   Meta's reliance on Article 6(1)(a) (consent) – collected through the paid subscription model for its 'ad personalisation' – can be lawful and, if so, whether its current process collects valid consent;

    ii. Meta unlawfully relies on Article 6(1)(b) (contract) for 'personalisation of the service(s), which is advertising in all but name and therefore constitutes Behavioural Advertising Processing;

    iii. Meta's 'personalisation of the service(s)' which is not Behavioural Advertising Processing is necessary for the performance of its contract with the Complainant (and other users);

    iv. Meta's 'ad personalisation' processing is fully necessary for that purpose in accordance with the principle of data minimisation.

    v.   Meta's processing breaches the principles of transparency, purpose limitation and fairness.

115. The Complainant respectfully asks that [SUPERVISORY AUTHORITY]:

    i.   Identifies a valid legal basis for Behavioural Advertising Processing and (a) if consent, requests Meta to implement a consent-collection process which complies with the GDPR, or (b) if there is no valid legal basis, request Meta to cease any unlawful processing of the Complainant's personal data (and, if [SUPERVISORY AUTHORITY] considers appropriate, of other data subjects' data).

    ii. Requests Meta to bring its data processing into compliance with the GDPR, in particular with the principle of lawfulness, the principle of fair processing, the principle of purpose limitation, and the principle of data minimisation.
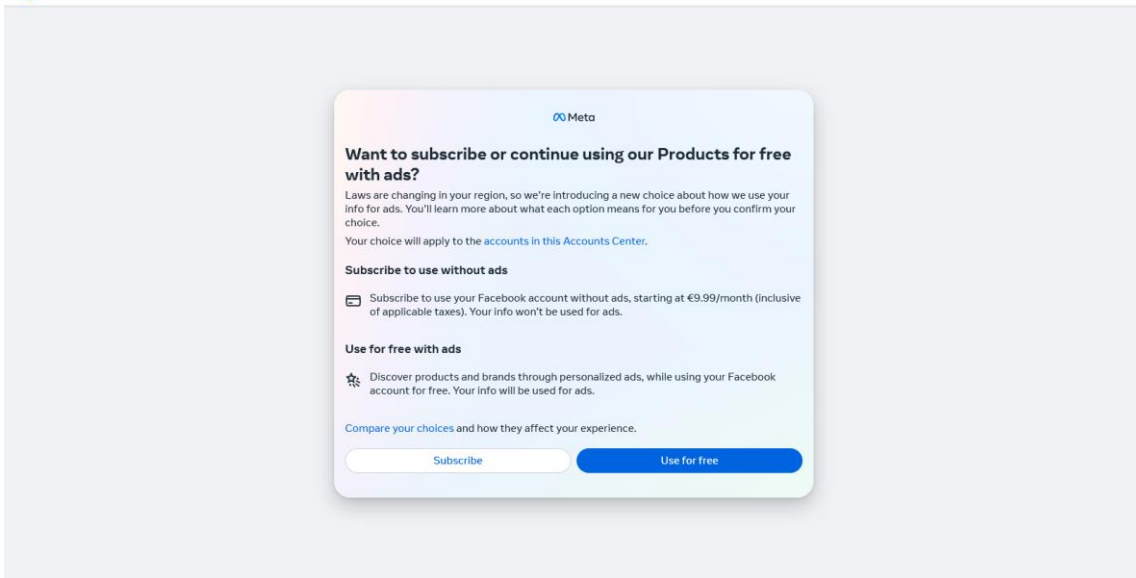
iii.   Requests Meta to delete any personal data unlawfully collected.

116. Bearing in mind the scale of Meta's processing and the length of time for which it appears to have been in contravention of the GDPR (pursuant to the decisions listed at para 44), the Complainant requests that the above steps be taken urgently pursuant to Article 66(1).

117. Finally, the Complainant respectfully suggests that [SUPERVISORY AUTHORITY] impose an effective, proportionate, and deterrent fine against Meta for the infringements of the GDPR, taking into account:

i.   The number of users affected other than the Complainant (being anyone with a Meta platform account and extending to non-users of Meta services; hundreds of millions of data subjects in the Union);

ii.   That Meta's Behavioural Advertising Processing has repeatedly contravened the GDPR;

iii.   That Meta has significantly profited from its contraventions of the GDPR; and

iv.   That fundamental principles of the GDPR and data subjects' rights have been infringed.

Annex 1: Meta Privacy Notice (accessed February 2024)

Annex 2: Screenshots of the subscription/consent collection process

Image 1: presentation of paid subscription model

Images 2 and 3: examples of Ad Topics and download your information metrics provided by Meta

Recently Viewed
Items you've recently viewed on Facebook including articles, groups, Stories, Marketplace items, Live videos and more

Generated by   on Thursday, January 18, 2024 at 2:07 PM UTC+01:00

Posts that have been shown to you in your Feed

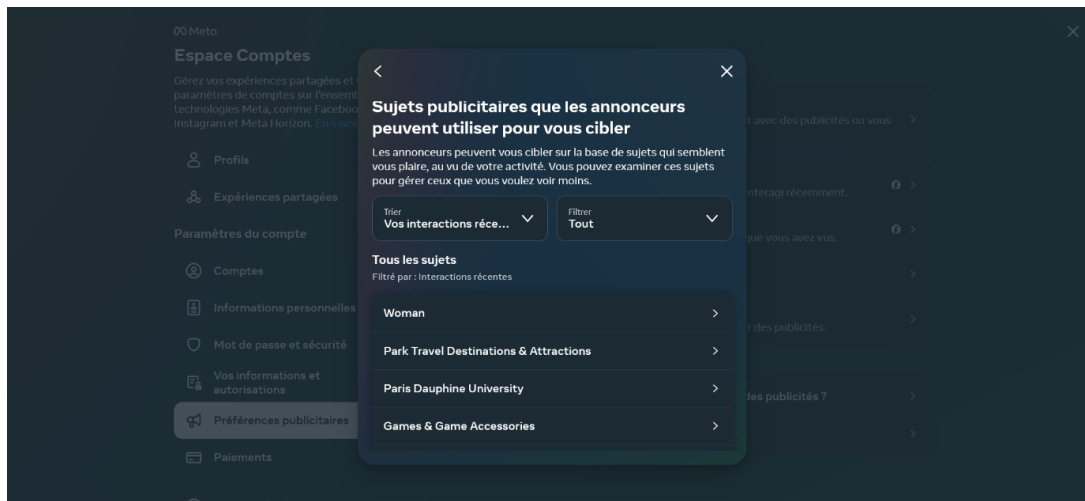Posts that have been shown to you in your Feed in the last 90 days.
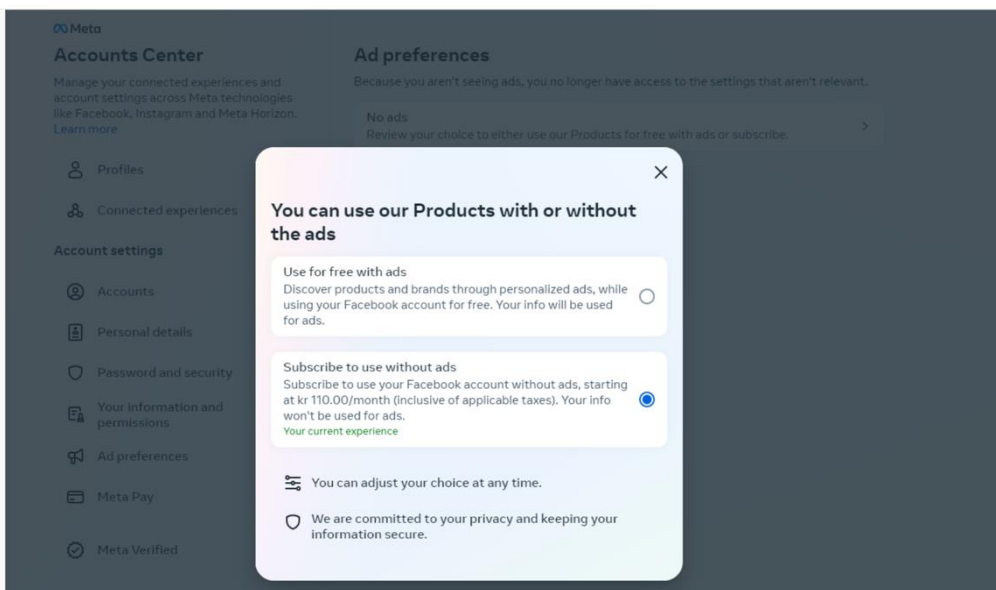
Image 4: withdrawing consent

Image 5: information presented regarding 'personalisation of the service(s)'

Images 6 to 11: presentation of ad and inconsistent Ad Topics/explanation: