



Processing Data for Behavioural Advertising

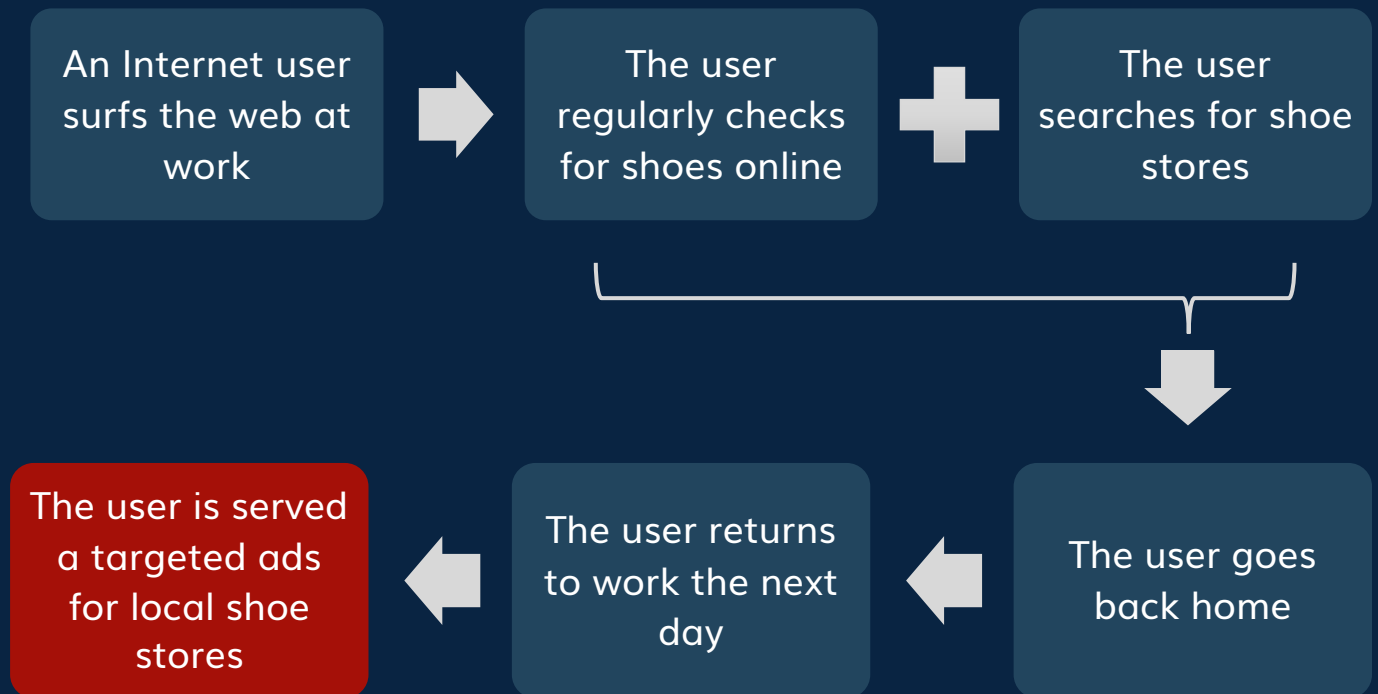
Meta's use of GDPR's legal bases and the new Pay or Okay model

What Is Behavioural Advertising?

"Behavioural advertising entails the tracking of users when they surf the Internet and the building of profiles over time, which are later used to provide them with advertising matching their interests."

Article 29 Working Party, Opinion 2/2010 on online behavioural advertising

Behavioural Advertising in Practice:



Why Is Behavioural Advertising so Important for Meta?

Great part of Meta revenue comes from advertisements. In this context, behavioural advertising serves Meta's better than any other form of advertising. According to a [survey](#) by the Network Advertising Initiative, conducted with 12 advertising networks, targeted advertisements based on user behaviour converted 6.8% compared with non-targeted ads at 2.8%.

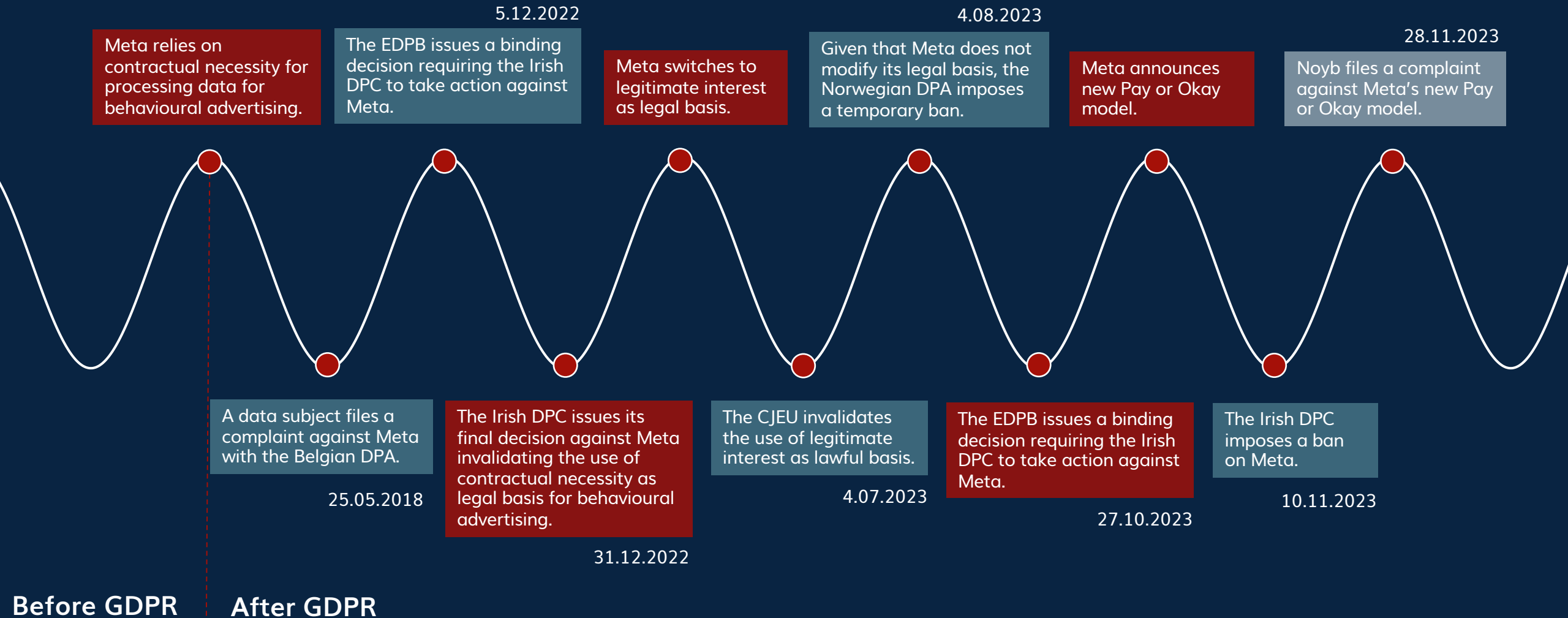
Meta's issue in aligning its behavioural Advertising practices with EU standards

To create personalised ads, Meta collects data from its users and creates profiles based on their interests.

As this process involves processing of Meta users personal data (on-line behaviour, activity), Meta requires must comply with GDPR.

To be able to benefit from behavioural advertising, Meta is obliged to use a lawful basis for the process.

Meta's Use of GDPR's Legal Bases Timeline



Meta relies on contractual necessity for processing data for behavioural advertising.

5.12.2022
The EDPB issues a binding decision requiring the Irish DPC to take action against Meta.

Meta switches to legitimate interest as legal basis.

4.08.2023
Given that Meta does not modify its legal basis, the Norwegian DPA imposes a temporary ban.

Meta announces new Pay or Okay model.

28.11.2023
Noyb files a complaint against Meta's new Pay or Okay model.

A data subject files a complaint against Meta with the Belgian DPA.
25.05.2018

The Irish DPC issues its final decision against Meta invalidating the use of contractual necessity as legal basis for behavioural advertising.
31.12.2022

The CJEU invalidates the use of legitimate interest as lawful basis.
4.07.2023

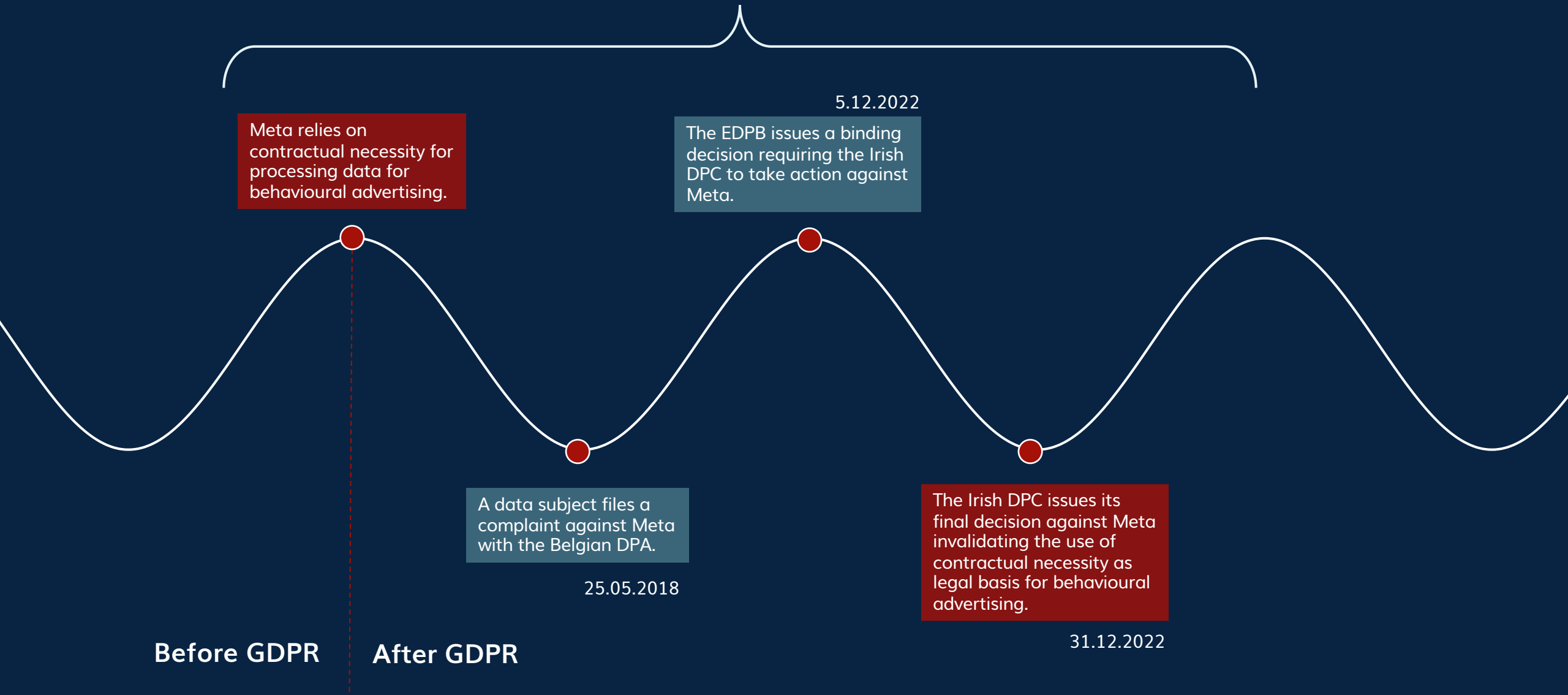
The EDPB issues a binding decision requiring the Irish DPC to take action against Meta.
27.10.2023

The Irish DPC imposes a ban on Meta.
10.11.2023

Before GDPR

After GDPR

Meta uses contractual necessity as legal basis for processing data for Behavioural Advertising



Contractual Necessity

1

The complaint

- ✓ Upon entry into force of the GDPR, Meta Ireland modified the Terms of Service for Facebook and Instagram, notifying users of changes in the legal basis for processing of their personal data.

: "Please accept our updated Terms of Service to continue using Facebook. We have updated our Terms of Service to explain in more detail how our service works and what we expect from all Facebook users. You can now more easily control your data as well as your privacy and security settings in the settings. We have also updated our Data Policy and our Cookie Policy. These now also take into account new features that we are working on and explaining. By clicking "I agree", you accept the updated Terms of Service. If you do not want to accept the terms of use, you can find your options under this link."

"If you do not agree, you can no longer use Facebook. You can delete your account and have the option to download a copy of your information beforehand. Close/Delete Account".

- ✓ To retain access to Meta services, users were required to accept the updated Terms of Service. Meta considered this acceptance the establishment of a contractual agreement between Meta and the user. Consequently, the processing of user data to render service, encompassing behavioural advertising, was based on Article 6(1)(b) GDPR.
- ✓ Complainants contended that Meta was "forcing them to consent to the processing of their personal data for behavioural advertising and other personalised services", thereby breaching GDPR.

Contractual Necessity

2

Draft Decision of the Irish DPC

- ✔ Complaints led to the Irish DPC, the lead supervisory authority for Meta in the EU, founding **Meta in violation of the transparency principle** (Articles 12, 13(1)(c), and 5(1)(a) GDPR) for not clearly informing users about processing details.
- ✔ However, Irish DPC considered that **Meta was not obligated to rely on consent, deeming data processing for online behavioural advertising reasonably necessary for contract performance** (Article 6(1)(b) GDPR). This perspective arises from considering personalized advertising as an inherent part of the service offered by Meta to users, a component acknowledged and accepted by the users themselves.

3

CSAs objections

- ✔ The Irish DPC shared its Draft Decision with the Concerned Supervisory Authorities (CSAs) in accordance with Article 60(3) GDPR. Multiple CSAs raised objections per Article 60(4) GDPR.
- ✔ CSAs argued that online behavioural advertising is not essential for online service contract fulfilment. Additionally, it **cannot be considered "necessary" given data subjects' inherent right to object to processing for direct marketing without providing a reason**, as per Article 21(2) GDPR.
- ✔ Regarding the violation of the transparency principle, the CSAs concurred with the Irish DPC's determinations. However, they expressed a view that the fines suggested by the DPC should be elevated

Contractual Necessity

4

EDPB Binding Decision

- ✓ The Irish DPC concluded that it would not follow the objections, as it did not consider them "relevant" and/or "reasoned", within the meaning of Article 4(24) GDPR.
- ✓ Given that consensus could not be reached, the Irish DPC referred the matter to the EDPB in accordance with Article 60(4) GDPR. The EDPB issued a [binding decision](#) and found Meta in violation of:
 - Its general **transparency obligations** by being unclear on the link between the purposes of processing, the lawful bases of processing, and the processing operations involved, irrespective of the validity of the legal basis relied on for the processing concerned.
 - The **fairness principle** (Article 5(1)(a) GDPR) by failing to transparently communicate to its users the details of processing operations, the specific personal data involved, the purposes served, and the legal basis for each processing operation.
 - The **lawfulness principle** by improperly relying on Article 6(1)(b) GDPR for processing personal data for behavioural advertising, as the latter is objectively considered non-essential and not a core element of Meta's claimed contract with its users. Since Meta has failed to provide an alternative legal basis for this processing, it is determined to be in breach of the principle of lawfulness.

Contractual Necessity

5

***Final decision
of the Irish DPC***

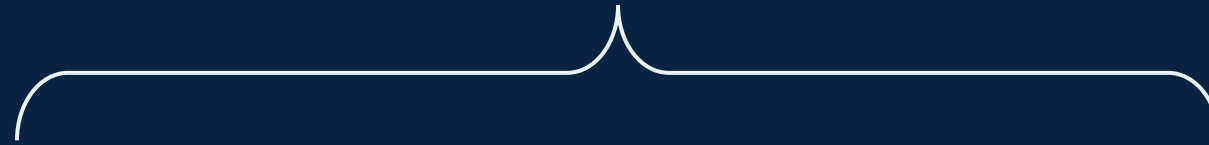
- ✓ On December 31, 2022, the Irish DPC issued its **final decision against Meta** invalidating the use of contractual necessity as legal basis for behavioural advertising.

Meta cannot rely on "contractual necessity" for processing data for behavioural advertising.

Meta is fined a total of €390 million for its breaches of the GDPR.

Meta has 3 months to ensure that its processing operations comply with the GDPR.

Meta switches to legitimate interest as legal basis for processing data for Behavioural Advertising



Meta switches to legitimate interest as legal basis.



The CJEU invalidates the use of legitimate interest as lawful basis.

Legitimate Interest

- ✓ After the EDPB's decision, which negated the use of contractual necessity as lawful basis for processing data for behavioural advertising, Meta adopted "legitimate interest" under Article 6(1)(f) GDPR as its new legal basis.

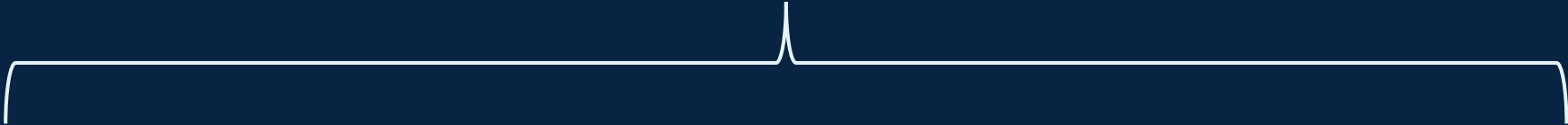


- ✓ Nonetheless, the CJEU invalidated this new legal basis ruling on *C-252/21 Meta vs Bundeskartellamt*.

C-252/21 Meta vs Bundeskartellamt

The CJEU emphasised that while personalized advertising for direct marketing is considered a legitimate interest for the controller, it must also be necessary for achieving that interest, and the data subject's interests and fundamental rights should not be overridden. Despite online social networks being free, **the user cannot reasonably expect the processing of their personal data for personalized advertising without consent**. In such cases, the user's interests and fundamental rights prevail over the network operator's interest in financing its activities through personalized advertising, especially considering the extensive and potentially unlimited data processing with a significant impact on the user's privacy.

The ban on Meta and switching to the Pay or Okay model



4.08.2023

Given that Meta does not modify its legal basis, the Norwegian DPA imposes a temporary ban.

Meta announces new Pay or Okay model.

27.10.2023

The EDPB issues a binding decision requiring the Irish DPC to take action against Meta.

10.11.2023

The Irish DPC imposes a ban on Meta.

27.10.2023

10.11.2023

The ban on Meta

Despite the CJEU's ruling, Meta did not modify the legal basis for processing users' data for behavioural advertising.



The Norwegian Data Protection Authority (DPA) decided to impose a **temporary ban** pursuant Article 66(1) GDPR, effective from August 4, 2023, **on the processing the personal data of data subjects in Norway for behavioural advertising, when relying on contractual necessity or legitimate interest.**



Additionally, the Norwegian DPA **submitted a request to the EDPB seeking a binding decision** to make the temporary ban on behavioural advertising on Facebook and Instagram permanent and applicable across the entire EU/EEA.



Following the EDPB binding decision, the Irish DPC imposed the ban on Meta on November 10, 2023. The ban is applicable only when relying on **contractual necessity or legitimate interest.**



On the October 27, 2023, **the EDPB issued a binding decision instructing the Irish DPA to take decisive measures against Meta**, issuing a ban on Meta's processing of personal data for behavioural advertising based on contractual necessity and legitimate interests across all EU/EEA.

The “Pay or Okay” model

- ✓ In the meantime, Meta has announced its intention of introducing a **paid subscription model** for Facebook and Instagram that would provide EU/EEA users with an ad-free experience.
- ✓ This gives users in the EU/EEA the option to **either receive personalized ads or choose an ad-free experience for €9.99/month on web or €12.99/month on iOS or Android.**

Meta's justification for the Pay or Okay model relies on paragraph 150 of *C-252/21 Meta vs Bundeskartellamt*, where the CJEU emphasized the need for an alternative to ads “if necessary for an appropriate fee.”

150 Thus, those users must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using the service offered by the online social network operator, which means that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations.

However, this is considered an *obiter dictum*, meaning an additional consideration by a court – in this case, the CJEU - that is not directly related to the case and is typically not binding.



National DPAs positions on the “Pay or Okay”

Austria – FAQ & Der Standard

The Austrian DPA **confirmed the permissibility of the Pay or Okay model, with certain considerations:**

- Full GDPR compliance for data processing based on consent (“okay”).
- The controller must not be a public entity.
- No exclusivity in terms of the content or services offered.
- No monopoly or quasi-monopoly position of the company on the market.
- An appropriate and fair price for the payment alternative (“pay”).
- No processing of personal data for advertising if users opt for the payment alternative.

Germany - Heise.de

The German DPA determined that the implementation of this model on Heise.de site failed to provide users with the option to give explicit consent for specific purposes, thus being non-compliant with GDPR. However, it **did not categorically rule out the use of the Pay or Okay system.**

German General Data Protection Conference:

- Tracking user behaviour requires effective consent compliant with GDPR requirements.
- Payment options can be an alternative to tracking consent if users get an equivalent service for a standard fee.
- Users opting for tracking-free subscriptions without additional consent may only undergo essential processes for the desired service under data protection law.
- Consents from non-subscribers in Pay or Okay models must be granular, allowing users to selectively approve individual processing purposes.

Complaints against Meta



28.11.2023

Noyb files a complaint against Meta's new Pay or Okay model.

04.12.2023

AMI files a complaint against Meta for its numerous violations of EU data protection laws.

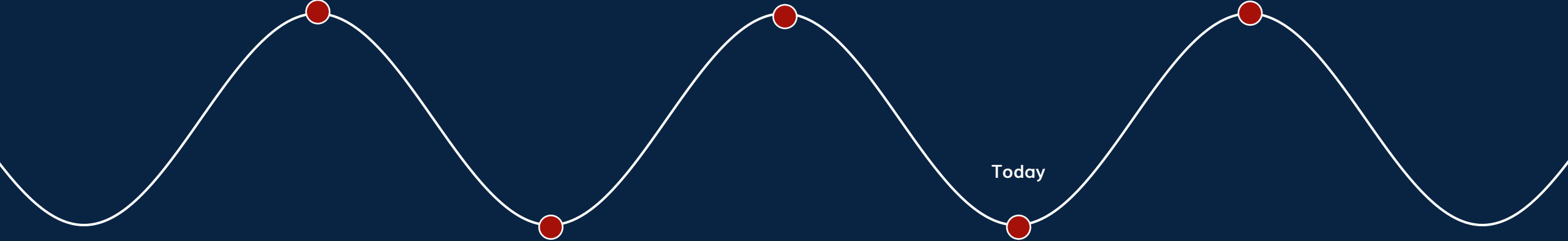
14.02.2024

SOMI will be taking Meta to court in order to seek damages on behalf of victims due to Meta's multiple breaches of GDPR.

Today

BEUC files a complaint against Meta's new Pay or Okay model under EU consumer law

30.11.2023



Noyb files a complaint against Meta

- ✓ On November 28, 2023, [noyb](#) filed a complaint against Meta's new Pay or Okay mechanism with the Austrian DPA.
- ✓ In its complaint, noyb urges the Austrian DPA to initiate an "urgency procedure" to stop the unlawful processing of data for behavioural advertising and to issue a deterrent fine.

Arguments advanced by noyb against Meta's Pay or Okay model:

- In spite of ongoing breaches of EU law, Meta persists in its efforts to **bypass data protection regulations** within the Union.
- This model contradicts the idea that consent should be "freely given."
- Research suggests that even though most users have little interest in personalized ads, in a Pay or Okay model, **almost everyone chooses the "okay" option rather than paying the fee.**
- Should the Pay or Okay system by Meta be accepted, there is a high probability that **it will be adopted by other companies, compelling users to pay for each service.**
- **This subscription model constitutes a fee for fundamental rights**, creating a scenario where only rich individuals can afford the right to privacy.

HOME > NEWS > NOYB FILES GDPR COMPLAINT AGAINST META OVER "PAY OR OKAY"

noyb files GDPR complaint against Meta over "Pay or Okay"

Nov 28, 2023



Project

Forced Consent & Consent Bypass

Support us!

noyb funding goal

75.91 %

INVEST IN PRIVACY!

Other legal actions against Meta

BEUC

- On November 30, 2023, the [European Consumer Organisation \(BEUC\)](#) lodged a complaint with the European Commission against Meta's Pay or Okay mechanism, citing a violation of EU consumer law.
- BEUC claims that Meta's partial blocking tactic is aggressive under EU consumer law, creating a false sense of urgency for users. **The presentation of a paid subscription as privacy-friendly is misleading, as user data is still collected for non-ad purposes.** Meta's information provision is criticized for being inadequate, with the supposedly "free" option not truly free, as users pay with their data. Due to Meta's market power and strong network effects, users lack a meaningful choice, and the high subscription fee for 'ad-free' services further restricts options.

AMI

- On December 4, 2023, the [Asociación de Medios de Información \(AMI\)](#) initiated legal action against Meta, representing 83 Spanish media outlets and seeking over €550 million.
- AMI claims that Meta violated EU data protection laws multiple times by **failing to secure appropriate consent for utilizing user data in advertising profiling. This alleged misconduct is said to have granted Meta an unjust competitive advantage** in the advertising market, ultimately harming the sustainability of Spanish media.

SOMI

- On February 14, 2024, [Stichting Onderzoek MarktInformatie \(SOMI\)](#) will participate in court proceedings against Meta, asserting claims, among other things, related to Meta's creation of profiles for targeted advertising without a valid basis, thereby violating the GDPR.
- In response to Meta's persistent breaches, SOMI argues that the company should be held accountable to compensate for both immaterial and material harm suffered by the victims, who are the data subjects affected by Meta's data processing. Specifically, the claim in relation to targeted advertising is based on "unjust enrichment," alleging that **Meta has unfairly benefited by processing personal data for behavioural advertising without adhering to the legal requirements.**

For any further inquiries or to explore our services in detail, please reach out to us at:

hello@whitelabelconsultancy.com

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