Submission of 9. 9. 2019
on the Draft Report of the Irish DPC

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[Superficially Reviewed Machine Translation - German Version has Priority]

1. Procedural Law

1.1. Applicability of the General Administrative Procedure Act (AVG)

We would like to make it clear at the outset that this complaint was lodged in accordance with the Austrian General Administrative Procedure Act (AVG) and that at least between the complainant and the Austrian DSB a procedure in accordance with the AVG applies and is also the basis for any appeal procedure.

The extent to which the Irish Data Protection Commission ("DPC") is willing and able to conduct such proceedings is not a matter for the complainant. However, the present approach cannot be reconciled with the AVG in many respects. We therefore urgently propose a direct exchange of DSB and DPC on the necessary procedural steps. It appears that the DPC has fundamentally false assumptions about the structure and meaning of complaints and necessary AVG procedures.

We would like to draw your attention again to the provisions of Articles 60 and 61 of the GDPR, which should enable the DPO to receive all relevant information and documents from the DPC in a timely manner - or, in the absence of cooperation pursuant to Article 61(8) in conjunction with Article 66 of the GDPR, to carry out an urgency procedure in order to act in conformity with the law within the AVG and to decide promptly. We are pleased to note that this was successful in relation to certain elements of the file.

1.2. Parallel application of GDPR, Austrian DPA and AVG

We are aware that Chapter 7 of the GDPR certainly lacks clarity. However, to the extent that the GDPR does not provide for any contrary provisions, the principles of the AVG (e.g. speed, efficiency of the procedure, official investigation) must also be fulfilled in cooperation with other authorities. Due to this double commitment, the resources of Chapter 7 (in particular requests for assistance and urgency procedures) are to be used accordingly in the light of the AVG. The principles of the AVG are also in line with the case law of the CJEU and the principles of Article 41 of the Charter of Fundamental Rights (CFR), to which the Irish DPC is also committed.

1.3. Subject matter, new submissions and motion under § 13(8) AVG

Facebook and the Irish DPC are likely to assume that the complainant must "anticipate" all possible and impossible counter-arguments and results of the investigation procedure in the introductory complaint and cannot adapt his submissions any more, that further interactions with the parties would not be necessary and that further submissions would be inadmissible.

This is neither effective (as the complainant would otherwise simply cite all legal bases in the GDPR out of procedural prudence) nor provided for in Austrian or Irish procedural law.

Likewise, there is no ban on new submissions in AVG. Nor can the legal views of Facebook (specifically a different view on the applicable legal basis) lead to situation where the core matter of the complaint are not being dealt with. In this case, it is instead necessary to examine this legal basis accordingly.

It appears that, based on this misconception, the DPC believes it can exclude certain questions from the proceedings and arbitrarily determine a *scope of procedure* based on the hypothetical or guessed will of the complainant (see in particular § 18, 44, 68 and 136 of the Draft Report). According to § 44 of the Draft Report, only the preliminary legal view was examined in the complaint. An answer to Facebook's submissions was not foreseen and no questions were asked.

It is also not alien to Irish procedural law that a request may be amended if, based on the defendant's submissions, another alleged legal basis for data processing arises. Since Facebook in particular is notoriously nebulous about the used legal basis, a "reformulated complaint" was also allowed by the DPC, for example, after Facebook had claimed for the first time in proceedings not to use "Safe Harbor" but standard contractual clauses (see Irish High Court, *The Data Protection Commissioner -v- Facebook Ireland Limited & anor, [*2017] IEHC 545, § 27).

For the sake of procedural precaution (and after having heard the surprising legal opinion of Facebook), the material application will now be adapted accordingly to the legal basis claimed by Facebook (see point 4.2 below). § 37 AVG also clarifies that in this case any missing investigations must be carried out in line with the adapted application.

1.4. Missing investigations and maturity for decision as defined by § 39(3) AVG

We want to highlight that the formal investigation can only be concluded once the relevant facts have been fully investigated and the parties have had full opportunity to comment.

As the Irish supervisory authority has not delivered any relevant results of an investigation in over 15 months other than a (grossly incomplete) statement from Facebook, a whole series of legal and factual questions remain completely open, it is unfortunately impossible to come to the conclusion that the investigation has reached a stage where a decision can be taken ("*Entscheidungsreife*" within the meaning of § 39(3) AVG).

In particular, the DPC did not investigate the factual matters highlighted in point 3.1 of the complaint (processing operations, purposes, legal basis), but independently limited the investigations to four hypothetical matters (see § 45 of the "Darft Report"). In § 46 of the Draft Report it is explicitly stated that the report is only based on the law, the complaint and the previously uncommented submissions of Facebook - without any proper exchange of arguments.

The factual findings are largely based on a pure self-assessment by Facebook. Generic written suggestive questions such as *"... please detail whether Facebook considers personal data ... to be processed lawfully, fairly and in a transparent manner...?* "(Submission of 27. 9. 2019, § 2.66) will rarely lead to the answer "*No, we don't think*".

Other statements by Facebook do not seem to have been subjected to any consideration of evidence either. An analysis of the Terms of Service and a classification of the clauses in categories like (1) information, (2) public relations, (3) contract or (4) consent is completely missing.

There seem to be two main reasons for the lack of fact-finding: *First,* the DPC conducted proceedings on a self-defined scope of the investigation under Section 110(1), which does not fully

overlap with the subject-matter of the complaint before the DSB. *Secondly,* that the investigator made various (false) assumptions about the true will of the parties on his office table, instead of getting to the heart of the case as quickly as possible by having a directly exchange of the arguments and views of the parties before working on a Draft Report.

In any case, there is no sufficient investigation according to reach a decision under § 39(3) AVG and we hope to point to all missing elements in this submission which would be necessary to reach a level that would allow a decision.

1.5. Aiding a swift procedure

We are astonished to note that we only received the first statement from Facebook 11 months (!) after it was submitted – despite requests for documents by the DSB at least since December 2018. The transmission of the second opinion also took more than 6 months. It is completely inexplicable to draw up a draft decision before the investigation has been completed or before we were able to make submission. Overall, there is a flagrant violation of § 39(2) AVG ("expediency, speed, simplicity and cost saving") and Article 41 CFR by this conduct of proceedings and delay.

In order to speed up the proceedings accordingly and to facilitate the exchange of arguments between the parties, we are of course also prepared to have an oral hearings (§ 40 AVG) in Dublin or Vienna, or are open to any other form of expedient litigation.

1.6. Confidentiality of documents

After reviewing the documents, we are unfortunately unable to identify any trade secrets or other confidential contents (§ 17(3) AVG). We therefore assume that the confidentiality of the documents is to be seen as an informal request of the authorities, which we will comply with in principle in order to facilitate cooperation with the Irish DPC. If specific legal obligations were to be imposed, we would hereby ask for a corresponding binding procedural order.

1.7. Forwarding of points to consumer and antitrust authorities

We note with astonishment that the Irish DPC has dealt with arguments on consumer law and monopoly issues by forwarding these issues to other authorities (§ 209 of the Draft Report).

It is clear from the complaint that these points must also be treated as a preliminary issue by the data protection authorities within the framework of valid consent. A "free" consent is usually not possible when facing a monopoly, which is directly relevant for the validity of the legal basis according to Article 6(1)(a) GDPR.

Any settlement of the argument by forwarding it to other bodies is therefore rejected.

1.8. Potential bias of the Irish Authority (§ 7 AVG)

Since it follows from Facebook's submission (e.g. page 2 of the submissions of 27. 9. 2018) that the Irish DPC even worked out (!) the procedure criticised in the complaint together with Facebook in ten sessions, the problem of bias is once again drawn to attention.

It seems difficult to imagine, for example, that the authority could make use of its power to issue penalties if it had worked on the punishable conduct with Facebook in advance. This also gives rise to a potential conflict with the GDPR, which provides in Article 83(1) for "*effective, proportionate and dissuasive*" penalties.

We do not yet know how the Irish authority intends to take case of this problem and we expressly reserve the right to appeal any decision on this basis.

1.9. Undisputed matters

In order to further concentrate and simplify the procedure, the following points may in any event be left undisputed:

1.9.1. No consent to privacy and cookie policies

Through Facebook's statement, it is clear that it only relies on the terms of service and the individual consents during the "User Engagement Flow". It continues to be unclear what is meant by the phrase "*additional information resources that you can access from the Terms of Use*" in the Article 6(1)(b) part of the "Legal Basis" document - the Privacy or Cookie Policy would fit the description of such an "*information resource*" (see point 2.1.1.2 below).

However, the parties seem to agree ultimately that there is no (valid) consent to any part of the Privacy or Cookie Policy. Even if the reasons appear different, the lack of consent to and in these documents can still be seen as undisputed.

1.9.2. Main Establishment and Controller

In the context of these proceedings, the complainant waives a detailed submission regarding the main establishment and the position of Facebook as the (sole) controller, as this appears irrelevant for these proceedings. The controllership of the Dublin office is therefore not disputed.

1.9.3. Existence of *(some)* contract

It is also undisputed that there is a contract between the complainant and Facebook.

When restating the national court's findings, the European Court of Justice also did not state anything more than this (undisputed) fact, in the cited judgment C-362/14 *Schrems*, even if Facebook seems to assume that this superior court has made further statements (§ 2.8 of the submission of 27. 9. 2018).

However, it is still disputed what this contract covers - in particular whether it contains valid data processing principles that go beyond absolutely necessary data processing for a "social network" (e.g. for advertising, product development or research) and whether various clauses are to be interpreted as part of the contract or consent.

1.9.4. Position of *noyb* under Article 80

In order to avoid misunderstandings, it is pointed out that *noyb* only presents the legal opinion of the complainant pursuant to Article 80(1) GDPR (analogous to the role of a lawyer). Since *noyb*

itself is not a party, neither the legal opinions nor anything that is declared as undisputed for the purpose of this procedure is binding on *noyb* itself.

2. Factual Submissions

2.1. Disputed Facts

The Draft Report and Facebook have put forward a number of false, incorrect or incomplete facts. The following facts are explicitly disputed or corrected and supplemented accordingly:

2.1.1. Specific clauses that Facebook relies on?

It is still unclear which clauses Facebook wants to use for which processing operation. In this case, the burden of proof clearly lies with Facebook, but there is neither a submission nor an investigation result on this crucial matter.

The Draft Report even expressly states in § 131 that the existence of a contract *can* only "*in principle ... provide a lawful basis*" and that all findings would be "*subject to a concrete assessment of the actual processing operations performed by Facebook*". Finally, § 136 of the Draft Report makes it clear that "*A full assessment of processing conducted on the basis of Article 6(1)(b) … would require a detailed factual assessment of the processing operations conducted in relation to the data subject in order to perform the Terms of Service"* and that such*" an exercise is beyond the scope of this inquiry*" - with references to an alleged limitation in point 1.6. of the complaint - although it is precisely these findings that were requested in point 3.1 of the complaint.

In summary, the necessary first logical step of any investigation (allocation of processing operation, purpose, data and legal basis) was not carried out.

2.1.1.1. Information in "Legal Basis" document

In the "Legal Basis" document, Facebook drastically restricts the parts of the contract that Facebook intends to invoke under Article 6(1)(b):

> *"We describe the contractual services for which this data processing is necessary* [1] *in the "Our Services" section of the Terms, and* [2] *in the additional informational resources accessible from the Terms."*

This results in the following picture for the user: (1) The only relevant part of the Terms of Service according to Facebook is therefore part 1 "Our Services" (but *not* parts 2 to 5, although these are in fact mostly contractual clauses and require data processing themselves). (2) At the same time, there appears to be undefined "information resources" which would serve as a legal basis under Article 6(1)(b) but which are inherently not part of the Contract.

2.1.1.2. "Description" of the service in Part 1 of the Terms of Service

It should also be noted that, according to the Legal Basis document, Part 1 of the Terms of Service is only a "*description*" *of* the services, not a contract itself. Facebook also uses the same term "*description*" in § 2.13 of the submission of 22. 2. 2019. The text is also more reminiscent of a description than a contract (it reads similar to an advertising brochure or a data protection declaration as defined in Article 13 or 14 GDPR).

2.1.1.3. "Additional information resources."

It is unclear what "*access from the terms*" means. We assume it means to cover linked pages. The Terms of Service themselves link to 29 other pages, including ten other guidelines or terms. All these pages in turn link to thousands of other pages. According to Facebook, all these documents are also the basis for data processing under Article 6(1)(b) GDPR. Only the directly linked pages are listed here briefly:

Informationsressource	**Link**
Facebook Products	https://www.facebook.com/help/1561485474074139?ref=tos
Data Policy	https://www.facebook.com/about/privacy/update
Settings	https://www.facebook.com/settings
Facebook Companies	https://www.facebook.com/help/111814505650678?ref=tos
The Facebook Company Products	https://www.facebook.com/help/195227921252400?ref=tos
About Facebook Ads	https://www.facebook.com/about/ads
Community Standards	https://www.facebook.com/communitystandards/
Terms and policies	https://www.facebook.com/terms.php#other-terms-policies
How to report things to Facebook:	https://www.facebook.com/help/181495968648557?ref=tos
Intellectual Property	https://www.facebook.com/help/intellectual_property?ref=tos
Basic Privacy Settings & Tools	https://www.facebook.com/help/325807937506242?ref=tos
App Visibility and Privacy	https://www.facebook.com/help/1727608884153160?ref=tos
Deactivating or deleting your account	https://www.facebook.com/help/250563911970368/?helpref=hc_fnav
How do I download a copy of my information on Facebook?	https://www.facebook.com/help/212802592074644
Our trademarks	https://en.facebookbrand.com/trademarks/
Facebook Usage Guidelines	https://en.facebookbrand.com/#brand-guidelines-assets
How do I permanently delete my Facebook account?:	https://www.facebook.com/help/224562897555674?ref=tos
My personal Facebook account is disabled	https://www.facebook.com/help/103873106370583?ref=tos
Commercial Terms	https://www.facebook.com/legal/commercial_terms
Music Guidelines	https://www.facebook.com/legal/music_guidelines
Memorialized Accounts	https://www.facebook.com/help/1506822589577997?ref=tos
Advertising Policies	https://www.facebook.com/policies/ads/#
Self-Serve Ad Terms	https://www.facebook.com/legal/self_service_ads_terms
Pages, Groups and Events Policy	https://www.facebook.com/legal/self_service_ads_terms
Facebook Platform Policy	https://developers.facebook.com/policy/
Developer Payment Terms	https://developers.facebook.com/policy/credits
Community Payment Terms	https://www.facebook.com/payments_terms
Commerce Policies	https://www.facebook.com/policies/commerce#
Facebook Brand Resources	https://en.facebookbrand.com/

2.1.1.4. "Information resources" are not part of the agreement according to the terms

The statement on 'information resources' is in turn in contradiction to part 4(5)(1) of the Terms, according to which there is no contractual agreement outside the Terms of Service (in particular not through '*information resources*'):

> *"These Terms of Use (formerly the "Statement of Rights and Responsibilities") constitute the entire agreement between you and Facebook Ireland Limited with respect to your use of our products. They supersede all previous agreements."*

Already under the Austrian Civil Code ("ABGB") "information resources" are clearly not a "contract" within the meaning of Article 6(1)(b) or the ABGB.

Furthermore, we assume that these "information resources" are not a contract and that the "legal basis" document is therefore false or irrelevant in this respect.

2.1.1.5. Explicit consents to the Terms of Service

Particularly in the new Terms of Service of 31 July 2019, there are now also quite explicit "declarations of consent" of the user, the wording of which already constitutes a clear consent in accordance with Article 4(11):

> *"By using our Products, you agree that we can show you ads that we think will be relevant to you and your interests. We use your personal data to help determine which ads to show you."*
>
> *"Instead of paying to use Facebook and the other products and services we offer, by using the Facebook Products covered by these Terms you agree that we can show you ads that business and organizations pay us to promote on and off the Facebook Company Products. We use your personal data, such as information about your activity and interests, to show you ads that are more relevant to you."*

In the Legal Basis document, these clauses (found in the introduction and in Part 2) are again not mentioned. It therefore appears that these clauses are not intended to constitute a contract within the meaning of Article 6(1)(b) of the GDPR, even according to the Legal Basis document. This begs the question what these clauses should constitute, other than a consent clause.

2.1.1.6. Facebook's submission

It is clear under Article 6(1) GDPR that it is for the processor to prove a legal basis - not for the complainant to guess what Facebook intends to rely on for which data processing and for what purpose. Facebook, however, explicitly refuses any submission and refers Article 6(1)(b) and "*other legal bases*" (sic!) or only to the "*description of the processing*" in Part 1 of the Terms of Service, but not to specific clauses or processing operations (§ 2.13 of the Submissions of 22. 2. 2019):

> *„For the avoidance of doubt, we wish to point out that the Complainant has failed to articulate any meaningful argument that any of the specific processing described in Section 1 of the Terms of Service cannot be based on Article 6(1)(b). As such and absent any specific or meaningful allegations challenging Facebook's reliance in this regard, Facebook Ireland simply restates its reliance on Article 6(1)(b) and other legal bases in respect of the specific processing described in Section 1 of the Terms of Service in the manner made clear to users in the Legal Bases Section and the Legal Bases Information Page."*

It should be emphasised that Facebook by no means refers exclusively to Article 6(1)(b) GDPR, but also to "*other legal bases*", i.e. de facto to any legal basis under Article 6(1)(a) to (f).

Facebook also speaks of a "*description of the processing*" in Part 1 of the Terms of Service, with which Facebook also seems to assume a factual description (see 2.1.1.5 above).

For reasons of procedural caution, it is disputed that any claim in Part 1 of the Terms of Service is a valid contract (see also point 3.6 et seq. below).

2.1.1.7. Only example in Draft Report: Copyright

The execution in § 100 of the Draft Report is completely incomprehensible, according to which part 3(2) of the Terms of Service is supposed to constitute a contractual basis, since this is clearly outside of part 1 of the Terms of Service (according to the "Legal Basis" document) presented by Facebook and, in addition, is supposed to represent a clear renunciation of "*intellectual property rights*" from the wording. The purpose of this provision is clear: users who share copyrighted material on Facebook also own those rights or grant Facebook distribution rights.

The fact that this is the only example of an analysis of a specific clause of the Terms of Service is indicative of the quality of this analysis.

2.1.1.8. Only truly factual clause

The only clause within Part 1 of the Terms of Service that seems to be reflective of the true contract between Facebook and the complainant seems to be the first part of the clauses under the heading "*Provide a personalized experience for you*" and "*Empower you to express yourself and communicate about what matters to you*":

> *"Your experience on Facebook is unlike anyone else's: from the posts, stories, events, ads, and other content you see in News Feed or our video platform to the Pages you follow and other features you might use, such as Trending, Marketplace, and search."*
>
> *"There are many ways to express yourself on Facebook and to communicate with friends, family, and others about what matters to you - for example, sharing status updates, photos, videos, and stories across the Facebook Products you use, sending messages to a friend or several people, creating events or groups, or adding content to your profile."*

This seems to be the only clause that neutrally sums up the functioning of a "social network", which is after all the core Facebook product.

2.1.1.9. Summary

In the absence of concrete evidence and of the results of an investigation, only general and abstract explanations can be made in this submission. It is astonishing that, after 15 months of proceedings and despite an explicit request (see point 3.1 of the complaint), the Irish DPC has no concrete results to show in this investigation.

Further submissions are therefore expressly reserved.

2.1.2. Introduction, Parts 1 and 2 of the Terms of Service are not a "contract" within the meaning of Article 6(1)(b)

Facebook and the Irish DPC have not said a word about or identified why specific parts such as the Introduction, Parts 1 and 2 of the Terms of Service should be a "contract" within the meaning of Article 6(1)(b). The assessment of the content of a text must not be based on Facebook's chosen headline or unilateral statement, but must be objectively judged by the content of the text or statement (see point 3 below).

The clauses in Part 1 of the Terms of Service are all neutral factual descriptions. Neither a duty of the user nor a service from Facebook results from the wording. Such as on the subject of advertising and research:

> *"We show you ads, offers, and other sponsored content to help you discover content, products, and services that are offered by the many businesses and organizations that use Facebook and other Facebook Products."*
>
> *"We engage in research to develop, test, and improve our Products. This includes analyzing the data we have about our users and understanding how people use our Products, for example by conducting surveys and testing and troubleshooting new features. Our Data Policy explains how we use data to support this research for the purposes of developing and improving our services."*

This further supports the view that, for example, advertising or research is a purely factual process and not a contract (see points 2.1.7 and 2.1.8).

Facebook bears the burden of proving the existence of a "contract" as defined in Article 6(1)(b) and an explanation as to which processing steps should be covered by each clause. It is not up to the data subject to second-guess which data they are processing on the basis of which half sentence of a clause. The complainant only has to argue that her data are processed and that she sees no legal basis for this.

For Facebook, therefore, nothing is gained if it explicitly "*merely repeats that [she] invokes Article 6(1)(b) and other legal bases*" (Draft Report, § 118).

In the absence of any submission from Facebook, it is therefore expressly denied that the introduction and parts 1 and 2 of the Terms of Service constitute a "contract". Since the legal qualification of Terms of Service as a contract is a preliminary question to Article 6(1)(b), this is dealt with essentially under point 3.6.

2.1.3. Alleged economic necessity of the GDPR infringement

- **No submission of concrete proceeds according to weaving forms**

Facebook states that the use of data is particularly necessary for advertising in order to finance the service (see § 1.3 of the statement of 27. 9. 2018). There is no evidence to support this.

It is not explained how different forms of targeted advertising are used that are possible *without* personal data, such as for example:

- Geographical targeting (based on the first digits of an IP address)
- Language targeting (based on browser language)
- Contextual targeting (based on the content of the page)
- Technical targeting (based on the terminal device, e.g. mobile/stationary)
- Time targeting (based on daily schedule or season)

Instead, Facebook tries to argue the *ancient* myth of monolithic data use for any type of advertising without differentiation according to advertising form and its intensity of intervention. This is neither economically nor de facto realistic.

In addition, the current economic debate assumes that for example the following effects must be taken into account for an evidence-based consideration of revenues from personalized advertising:

- Large parts of online advertising is still untargeted advertising (e.g. all users in a geographical region) which does not require any personal data.
- A "substitution effect" would have to be captured - i.e. how much revenue from personalized advertising would flow back into classic advertising forms if these advertising forms were restricted and would thus be neutral for Facebook sales. The global advertising turnover is constant in the long run ("the cake does not grow/shrink").
- How costly the complex preparation and evaluation of user data is itself and thus leads to economic expenses.

Evidence-based figures for the economic benefit of personalized advertising start at about 4% revenue growth for publishers (such as *Online Tracking and Publishers' Revenues): An Empirical*

Analysis, *Veronica Marotta, Vibhanshu Abhishek and Alessandro Acquisti*). Of course, Facebook's numbers will differ as it is not just a publisher, as it is clear that you need to differentiate economically between levels of online advertising companies and types of advertising.

- **Necessary holistic economic assessment**

The (1) concrete turnover figures from advertising would have to be compared with (2) the actual production costs per user and (3) the value of the content contributed by the user.

The complainant deliberately overlooks the fact that the user already pays with his content, which - in comparison to classical websites - the users create. No one visits Facebook because of the beautiful blue stripe at the top of the screen, but because of the content of other users that is shown below that stripe.

In comparison to traditional media, "Facebook" only represents the "mediation platform" - as users not only consume content, but also generate it - without remuneration. If one compares this with classical media such as television, radio or a newspaper, it is not the creator of content, but the antenna operator or newspaper deliverer, who receives 100% of the fees and advertising revenues for himself.

Only a holistic economic assessment could seriously calculate the economic necessity of the additional total misuse of all personal data. In fact, thisw would presumably even lead to a nullity of the contract under the *laesio enormis* rules in the AGBG instead of any "economic necessity" (see point 3.6.7.1 below).

- **Irrelevance of the question**

If only the economic necessity to make as much profit as possible would be recognized by the GDPR, then every illegal data harvester would be entitled to sell all data of the world, since he would otherwise make no profit.

This economic necessity must therefore be strictly distinguished from the legal necessity within the meaning of Article 6(1)(b) - which in any case does not exist (see point 3.6.1 below).

- **Summary**

In the light of Facebook's extremely high profit margins (approx. 30%) and in the absence of any factual evidence that the services cannot be operated economically in compliance with the GDPR, this argument is expressly disputed and it is requested that Facebook be ordered to provide appropriate evidence if it wishes to maintain this (irrelevant) argument.

2.1.4. Consent to the processing specified in the Terms of Service

Undisputedly and conceded by Facebook itself, until 25. 5. 2018 Facebook based its processing on the consent of users pursuant to Article 2(h) of Directive 95/46/EC. The DPC has been aware of this since the audit report of 21. 12. 2011 (see page 30 ff).

Equally Facebook's submission to the Regional Civl Court in Vienna (LGfZRS) in case 3 Cg 52/ 14k: "*1. Before GDPR: Before the GDPR came into force, users gave their express consent to the processing of their data*" and the execution of the legal submission after 25. 5.2018: "*2. Approach under the GDPR: As set out in the Data Policy and Legal Basis Information, the defendant currently requires* "*user consent*" *only in exceptional cases* (see extract from Facebook's submission in Annex A).

2.1.4.1. No information on the change of legal basis

However, none of the 28 screenshots presented by Facebook on pages 12 to 37 of the opinion of 22. 2. 2019 contains any information about a change in the legal basis on 25 May 2018 vis-à-vis users. Facebook has also not provided any argument to the effect that such information was provided.

On information, Facebook refers only to the information on a sub-sub-page, the "Legal Basis" document. From the "User Engagement Flow" users first have to click on the link to the privacy policy, then scroll to the legal bases and then click a small link again to find this information.

2.1.4.2. Active information that no change is taking place

Contrary to Facebook's argument, it expressly denied a substantial change in the introduction of the new Terms of Service and Privacy Policy:

- **Direct user information**

Already in the "User Engagement Flow" shown to the user (see page 6 of the complaint), the user is promised, for example: "*You can now controll your data [...] even more easily in the settings*" - although with a conversion to Article 6(1)(b) the user's objective control is lost (in particular information, freedom of decision or the right to revoke consent at any time).

At the same time, the description of the "updates" to the Terms of Service, Data and Cookie Policy is silent on any change to the legal basis.

- **Official Facebook news page on April 5, 2018**

To introduce the new Privacy Policy and Terms of Service, Facebook posted various information online under the title: "*We make our Terms of Use and our Privacy Policy easier to understand - the permissions to use your data on Facebook will not change*" (newsroom.fb.com, Posting of April 5, 2018, Annex B).

Not one word announces a change in the legal basis - on the contrary, Facebook stated "*These updates are all about explaining things even better. It is not about gaining new authorization to collect, use, or share your information on Facebook. We're not changing any privacy settings you've made in the past."*

If a change of legal basis under Article 6 GDPR is not a "*new authorization*" it either has not taken place, or the users have been openly and knowingly lied to.

- **Official Facebook news page on April 17, 2018**

On April 17, 2018, on English page Facebook also praised the changes as improvements for the user under the title "*Complying With New Privacy Laws and Offering New Privacy Protections to Everyone, No Matter Where You Live*".

There is no mention of any change in the legal basis. On the contrary, there is talk of "*more control*", "*new data protection experiences*" and an opportunity for Facebook to "*invest even more in privacy*" (newsroom.fb.com, posting of 17 April 2018, Annex C).

2.1.4.3. No clear statement on the "Legal Basis" page

Facebook refers primarily to the sub-sub-page "Legal Basis", which was particularly well hidden. Although Facebook talks of a "layered approach", as § 175 ff of the Draft Report correctly describes, this is probably more accurately described as a non-transparent game of hide and seek.

In particular, there is also no clear statement which data are processed for which purposes under the legal basis of Article 6(1)(b) GDPR. Although reference is made to the "*Description*" *of* the "*Contractual Services*" in the "*Our Service*" section of the Terms of Service, this part of the Terms of Service is largely not an enforceable contract (see Section 3.6 below) and therefore there is no "*Contractual Service*". Consequently, the reference points to nowhere. The reference to '*additional information resources*' also does not make any concrete sense (see point 2.1.1 above).

As examples, Facebook also mentions only the "*provision, personalization and improvement of our Facebook service*" without specifying exactly which services these are (..only those to the user? ..only those that the user actively uses? ..also the services that Facebook offers advertisers?).

Concrete data usage such as "*advertising*" or for "*advertisers"*, on the other hand, are only mentioned under the points under Article 6(1)(a) and (f) in various situation. The average consumer is thus once again left with the information that this processing is based consent or even a legitimate interest.

2.1.4.4. Deceptive Design

If Facebook had actually changed the legal basis, it would also have used every trick in the book to hide this alleged fundamental change from the complainant, as the "*User Engagement Flow*" shows:

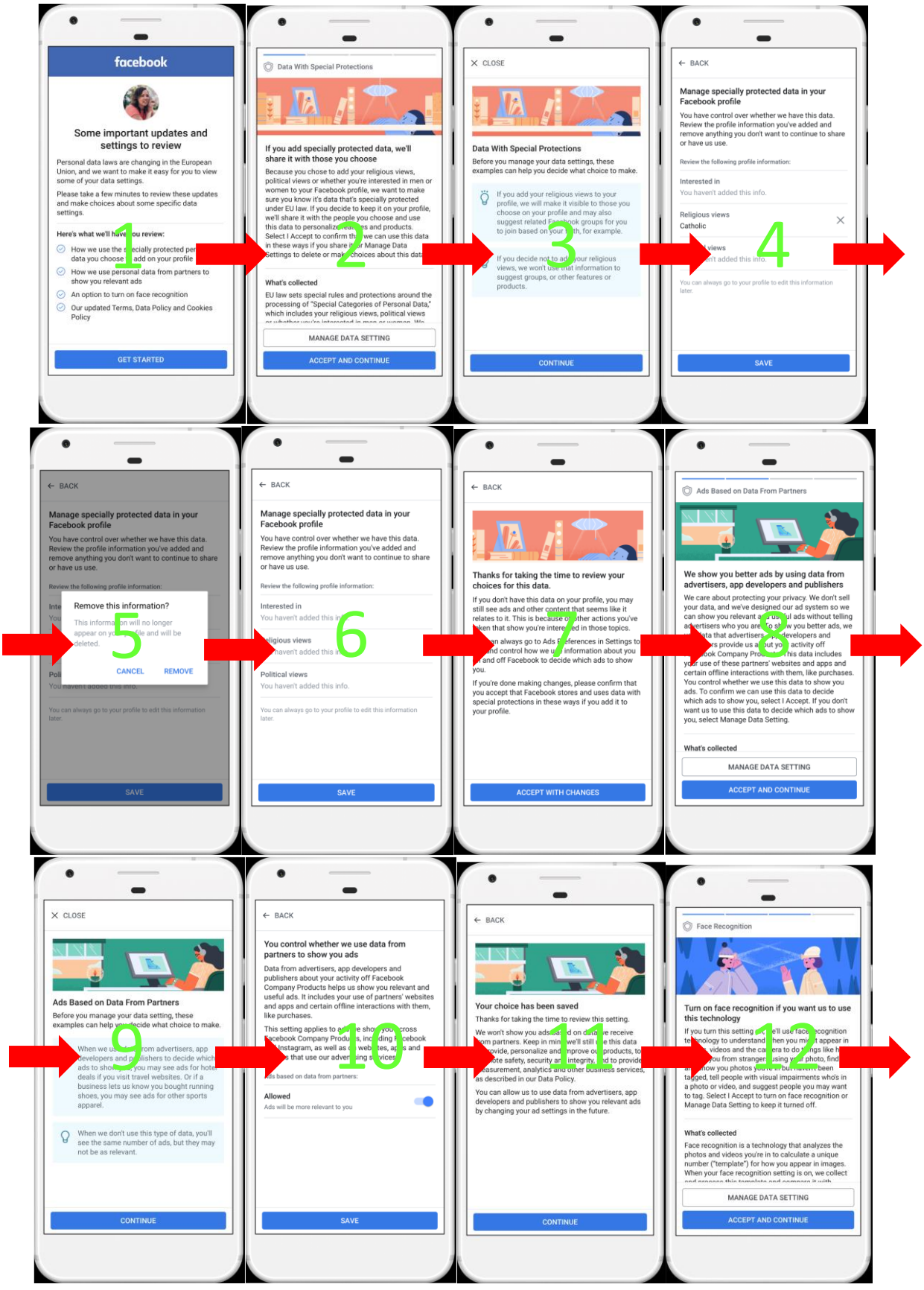
- **Preparation ahead of the consent**

Already on the first page of the "*User Engagement Flow*" (see page 12 of the statement of 22. 2. 2019), clear reference is made to changes due to new data protection laws in the EU (so the GDPR) and to changes in the Terms of Service, the Privacy and the Cookie Policy. Particularly at the time when the GDPR was introduced, every average consumer expected another request for consent pursuant to Article 4(10) of the GDPR.

- **Use of *Click* Fatigue**

As Facebook very impressively shows in its submission of 22. 2. 2019 in Appendix 1 (pages 12 to 36), that the complainant had to navigate through 21 (!) pages with settings in order to then agree on the *twenty-first* (!) page to the alleged fundamental changes of the legal basis from Article 6(1)(a) to 6(1)(b) GDPR.

In a short overview, we have taken the liberty to present the steps on the next two pages:


facebook
Some important updates and settings to review
Personal data laws are changing in the European Union, and we want to make it easy for you to view some of your data settings.
Please take a few minutes to review these updates and make choices about some specific data settings.
Here's what we'll have you review:
How we use the specially protected personal data you choose to add on your profile
How we use personal data from partners to show you relevant ads
An option to turn on face recognition
Our updated Terms, Data Policy and Cookies Policy
GET STARTED
1
Data With Special Protections
If you add specially protected data, we'll share it with those you choose
Because you chose to add your religious views, political views or whether you're interested in men or women to your Facebook profile, we want to make sure you know it's data that's specially protected under EU law. If you decide to keep it on your profile, we'll share it with the people you choose and use this data to personalize ads and products. Select I Accept to confirm that we can use this data in these ways if you share it. Manage Data Settings to delete or make choices about this data.
What's collected
EU law sets special rules and protections around the processing of "Special Categories of Personal Data," which includes your religious views, political views or whether you're interested in men or women.
MANAGE DATA SETTING
ACCEPT AND CONTINUE
2
CLOSE
Data With Special Protections
Before you manage your data settings, these examples can help you decide what choice to make.
If you add your religious views to your profile, we will make it visible to those you choose on your profile and may also suggest related Facebook groups for you to join based on your [illegible], for example.
If you decide not to add your religious views, we won't use that information to suggest groups, or other features or products.
CONTINUE
3
BACK
Manage specially protected data in your Facebook profile
You have control over whether we have this data. Review the profile information you've added and remove anything you don't want to continue to share or have us use.
Review the following profile information:
Interested in
You haven't added this info.
Religious views
Catholic
Political views
You haven't added this info.
You can always go to your profile to edit this information later.
SAVE
4
BACK
Manage specially protected data in your Facebook profile
You have control over whether we have this data. Review the profile information you've added and remove anything you don't want to continue to share or have us use.
Review the following profile information:
Remove this information?
This information will no longer appear on your profile and will be deleted.
CANCEL
REMOVE
You can always go to your profile to edit this information later.
SAVE
5
BACK
Manage specially protected data in your Facebook profile
You have control over whether we have this data. Review the profile information you've added and remove anything you don't want to continue to share or have us use.
Review the following profile information:
Interested in
You haven't added this info.
Religious views
You haven't added this info.
Political views
You haven't added this info.
You can always go to your profile to edit this information later.
SAVE
6
BACK
Thanks for taking the time to review your choices for this data.
If you don't have this data on your profile, you may still see ads and other content that seems like it relates to it. This is because other actions you've taken that show you're interested in those topics.
You can always go to Ads Preferences in Settings to learn and control how we use information about you to show ads off Facebook to decide which ads to show you.
If you're done making changes, please confirm that you accept that Facebook stores and uses data with special protections in these ways if you add it to your profile.
ACCEPT WITH CHANGES
7
Ads Based on Data From Partners
We show you better ads by using data from advertisers, app developers and publishers
We care about protecting your privacy. We don't sell your data, and we've designed our ad system so we can show you relevant and useful ads without telling advertisers who you are. To show you better ads, we use data that advertisers, app developers and publishers provide us about your activity off Facebook Company Products that we can't see. This data includes your use of these partners' websites and apps and certain offline interactions with them, like purchases. You control whether we use this data to show you ads. To confirm we can use this data to decide which ads to show you, select I Accept. If you don't want us to use this data to decide which ads to show you, select Manage Data Setting.
What's collected
MANAGE DATA SETTING
ACCEPT AND CONTINUE
8
CLOSE
Ads Based on Data From Partners
Before you manage your data setting, these examples can help you decide what choice to make.
When we use data from advertisers, app developers and publishers to decide which ads to show you, you may see ads for hotel deals if you visit travel websites. Or if a business lets us know you bought running shoes, you may see ads for other sports apparel.
When we don't use this type of data, you'll see the same number of ads, but they may not be as relevant.
CONTINUE
9
BACK
You control whether we use data from partners to show you ads
Data from advertisers, app developers and publishers about your activity off Facebook Company Products helps us show you relevant and useful ads. It includes your use of partners' websites and apps and certain offline interactions with them, like purchases.
This setting applies to ads shown across Facebook Company Products, including Facebook and Instagram, as well as on websites, apps and devices that use our advertising services.
Ads based on data from partners:
Allowed
Ads will be more relevant to you
SAVE
10
BACK
Your choice has been saved
Thanks for taking the time to review this setting.
We won't show you ads based on data we receive from partners. Keep in mind, we'll still use this data to provide, personalize and improve our products, to provide safety, security and integrity, and to provide measurement, analytics and other business services, as described in our Data Policy.
You can allow us to use data from advertisers, app developers and publishers to show you relevant ads by changing your ad settings in the future.
CONTINUE
11
Face Recognition
Turn on face recognition if you want us to use this technology
If you turn this setting on, we'll use face recognition technology to understand when you might appear in photos, videos and the camera to do things like help you from strangers using your photo, find photos you're in but haven't been tagged, tell people with visual impairments who's in a photo or video, and suggest people you may want to tag. Select I Accept to turn on face recognition or Manage Data Setting to keep it turned off.
What's collected
Face recognition is a technology that analyzes the photos and videos you're in to calculate a unique number ("template") for how you appear in images. When your face recognition setting is on, we collect and process this template and compare it with
MANAGE DATA SETTING
ACCEPT AND CONTINUE
12

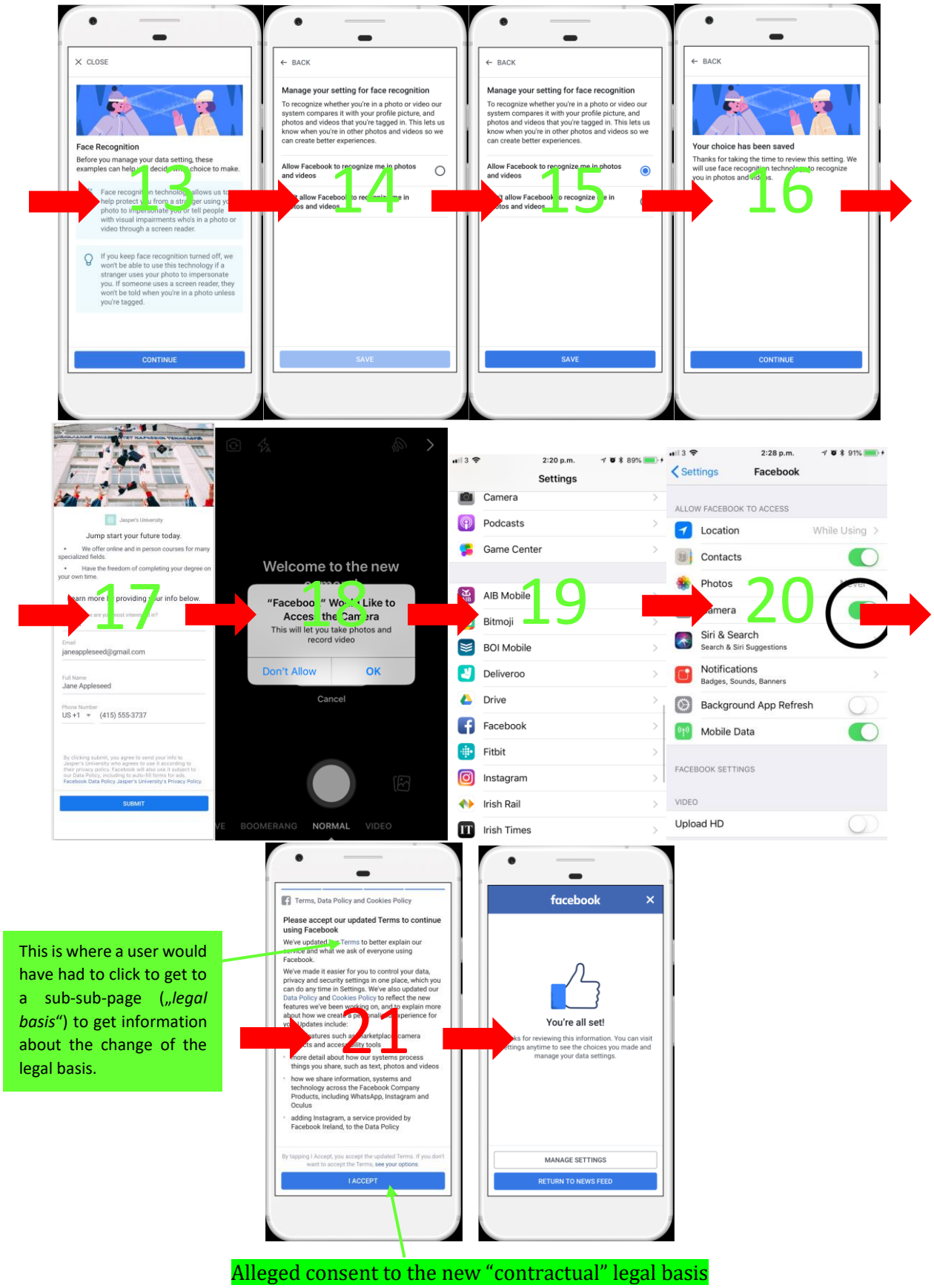


Fig.: 21 clicks to the alleged change of legal basis (according to Facebook)

It is known that after a number of pages in such flows users just kick "okay" or "next" ("*Clique Fatigue*"). Here the complainant had to kick over 21 times and read small print on a mobile phone display to then reach the last page (put forward by Facebook) on which, according to Facebook, she should lose all his data protection rights due to the switch from Article 6(1)(a) to 6(1)(b) GDPR. 99% of all users here are probably at a point where they are in no way receptive, even if the switch were made clear (which did not happen).

A fair and transparent (Article 5 GDPR) design of websites puts the relevant and important matters at the beginning. It can be assumed that Facebook deliberately did not do this.

- **Design of the final consent page**

The consent page explicitly refers to "*Terms of Use, Privacy Policy and Cookie Policy*" in the header and also links to all three documents in the body text. At the end there is a huge blue button with the word "I accept".

It is well known that the headlines and the blue links are particularly eye-catching, while continuous text is not read. Likewise, users read from top to bottom and usually not to the end of the page, which is why texts at the end are usually not read.

The site is therefore clearly designed in such a way that the user only actively perceives the three documents (terms of use, data protection and cookie guidelines) and the "I accept" button.

- **Relevant information practically untraceable**

It is also important to note that there is not a single word on the page that implies a change of legal basis or a substantial change to the contract. A user would have to (1) click on the new Terms of Service, then (2) click on the link to the privacy policy and then (3) click again on the link to the legal bases in order to be able to come up with the idea of a change according to Facebook (even if the wording of the "legal bases" page also does not allow you this conclusion).

- **Design of the subtext on which Facebook relies**

Facebook probably relies primarily to the grey subtext above the "I accept" button.

The subtext has been pushed into the background under all tricks on the book: It is 42% lighter at the end of the page (147 compared to 36 of 255 grayscales) and uses massively smaller and thinner letters which lead to about 57% less letter area (the "I" in the subtext has about 13x1 clearly black pixels compared to the "I" of "Instagram" in the dotation with 15x2 pixels - see the enlargement on the right).

How the Draft Report was able to come up with the idea that the information was not "*hidden in the small print*" (§ 130) is especially difficult to see given this design.

- **"Legal Basis" page**

The same applies to the "Legal Basis" document. Here it is striking that also very small fonts (12px instead of 16px in the data protection directive, equivalent to font size 9 instead of 12 points in normal text editors) and no formatting is used. The page is therefore (contrary to all other pages) extremely difficult to read, which again points to the deliberate difficulty of finding information (see Annex D).

- **No submissions or results of the investigation regarding actual click behavior**

Given this design of the "User Engagement Flow", it is not surprising that Facebook does not make any claim about how many users have actually accessed the "Legal Basis" page and thus only theoretically had the opportunity to understand that they agree to a change between Article 6(1)(a) and (b). Because Facebook tracks all clicks on its page, Facebook should easily be able to provide the appropriate data.

In the absence of an opposing submission, it is disputed that the complainant and/or a relevant number of users have factually been notified of the information.

- **Summary**

To sum up, one can say that Facebook has used all the tricks of modern web design to ensure that users here do not agree clearly, in an informed and transparent way to a change from Article 6(1)(a) to 6(1)(b) GDPR, as is now claimed.

2.1.5. On the five consent cases in the "User Engagement Flow

Facebook clearly provides misleading or false information regarding those processing activities that undisputedly take place pursuant to Article 6(1)(a). It seems completely unclear why the DPC assumes that these forms of processing should not be covered by the complaint (§ 68 of the Draft Report), since they are also named in the Privacy Policy and the complaint is based on consent to all these processing operations. In detail:

2.1.5.1. Processing of special categories of data

Facebook pretends that special data categories only occur in the (well-hidden) "*General Information*" part of the user profile, in which one can, for example, specify religious views.

However, this is only a tiny part of data that belongs to the special categories under Article 9 GDPR. For example, messages (see examples from the complainant's data set on the right on health data), event invitations or postings from other users regularly contain special categories of data (e.g. messages on health or sex life and invitations to political events).

These are also processed by Facebook (contrary to the false statement in § 2.51 of the statement of 27. 9. 2018) - for example, one can target all users who are interested in the FPÖ (the far-right Austrian “Freedom Party”) - which clearly allows political targeting without this data being stored in the profile of the user. It is not even necessary to actively "like" the FPÖ, because Facebook lists 3.7 million users who are interested in the FPÖ, even if only about 130,000 users “like” the FPÖ account on Facebook. This means the political interest must be derived from other data.

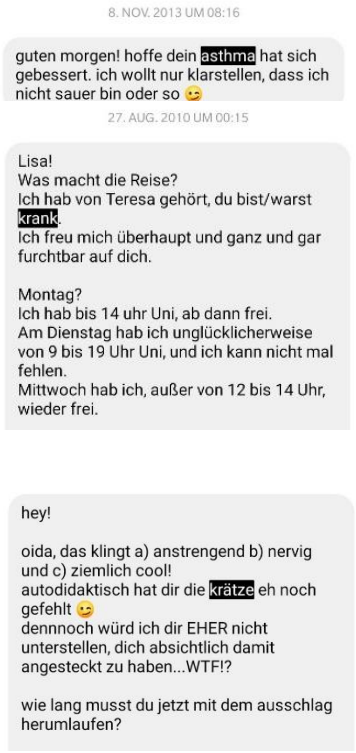


Fig: Targeting on Facebook on an interest in the "FPÖ" (political opinion, special categories)

It is highly surprising that the Irish DPC did not check this obvious lie of Facebook with at least a few clicks (as they claim no use of special data categories, see § 2.25 of the statement of 22. 2. 2019) although this fact has already been expressly pointed out on page 2 of the complaint ("*even if the person concerned has not directly stated this information in his profile*").

It is therefore disputed that special categories of data (within the meaning of Article 9 GDPR) are processed only with consent.

2.1.5.2. Processing of biometric data

Facebook further argues that facial recognition data is only collected with the consent of the user. This is technically and logically impossible.

Logically, the biometric fingerprint of the complainant in any uploaded photo must first be generated, processed and stored. Only when a biometric fingerprint has been generated it can be matched with the data of the users who have given their consent to this. However, the biometric data of the complainant will also be generated if she has not given her consent. Facebook conceals this obvious fact and therefore deliberately makes false claims.

With 300 million photo uploads per day, Facebook generates millions of biometric fingerprints every day from everyone whose photo is uploaded to Facebook (whether user or third party). There is no legal basis for this. This biometric data is then matched with a database, which (presumably) contains only those users who have given their consent for facial recognition.

There is no evidence or result from the investigation that suggests otherwise.

It is completely unclear what happens with biometric fingerprints that do not lead to a match. These could, for example, theoretically be retained in order to be able to assign the images as soon as a user agrees to the deposit of his biometric data in the database - or even be permanently deleted. This seems irrelevant from a legal point of view, since the first processing step already takes place without a legal basis.

In summary, it is therefore disputed that biometric data are only processed with consent, as this is technically impossible.

2.1.5.3. Processing of data from external advertising partners

The Draft Report does not raise with a single word what the difference is between the "use" of this data and the processing of the data. It is clear from Facebook's submissions that Facebook continues to collect data from external advertising partners despite refusal of consent and thus "processes" this data as defined in Article 4(2) GDPR. The page for the setting even says explicitly:

> *"We do not delete any data if you do not allow the use of this data for advertising purposes. You will continue to see the same number of advertisements. However, these are based on your activities in Facebook companies' products or may originate from certain companies with whom you have shared your contact information (if we have matched your profile with their customer list). "*

According to Facebook (page 6, point 3 of the statement of 22. 2. 2019), only use for targeted advertising is to be based on consent. This raises two questions: What is the legal basis under Article 6(1) for other processing – and how can processing comply with the principle of purpose limitation and data minimisation under Article 5(1)(b) and (c) when data are processed here for advertising purposes but simultaneously without being used for advertising purposes (processing without purpose)?

There is no argument or investigation on this matter. Facebook apparently expects that the DPAs will not recognize the difference between "use" and "processing" - and seems to have even been successful in this attempt when looking at the Darft Report.

It is therefore disputed that data is processed by third parties only after consent and the statement by Facebook is emphasized that the data is processed in any situation (even if they are not used for certain processing steps).

2.1.5.4. Passing on data to external advertising partners

It is completely unclear what Facebook is trying to say at the end of page 9 of the submission of 22. 2. 2019 on "*Sharing data with advertising partners".* The Privacy Policy talks of "partners" and "advertisers" with massively different statements about the disclosure of data. "Ad Partners" do not exist neither in the English nor the German version. It is therefore requested that this transaction be clearly identified.

It is provisionally disputed that Facebook advertising partners only pass on data with consent.

2.1.5.5. Consent via device settings

Facebook cannot possibly implement informed and specific consent via the use of device settings. Such consent is clearly invalid due to the lack of information for which specific purposes, which specific data will be used. This information is not included in the dialogue of iOS or Android. Only the app and a (rough) access category (such as all data stored on the device) are shown here.

This is especially true since Facebook uses the principle of a wild mix of generic privacy claims and merely claims to use all data of all users for extremely generic purposes and for all current to future data applications.

An example of this is the current scandal about the use of microphones for Facebook messenger. Here the user allowed the microphone of a smart phone to be used to record messages, but was probably not aware that Facebook had these recordings listened to by employees at the same time - as recently became known (https://www.dw.com/de/auch-facebook-lie%C3%9F-audio-chats-abtippen/a-50015895).

It is therefore disputed that this forms informed and specific consent.

2.1.6. Facebook use "because of advertising"?

It is denied that advertising, research and other processing in the interest of Facebook is the "*core of the service*" (§ 1.4 of the opinion of 27. 9. 2018) of Facebook.

No average consumer would say: "*Facebook, yes that's this advertising page on the Internet. I don't really care what my friends post there, I just stay on Facebook for the great ads - and so they can do research on my personal data*."

The argumentation is as realistic as a user who claims that he would only view a pornographic website "*because of advertising*".

Facebook has provided neither evidence nor even an almost conclusive argument for the ridiculous and impractical assertion that advertising (and similar secondary processing) is a core service.

It is completely incomprehensible why the DPC seems to assume this in its Draft Report without any explanation. As this argument is not based on any evidence, it is denied and instead it is argued that the functions of a "social network" (such as profile, news, photo albums, friend lists) are the core service.

2.1.7. Advertising is a factual procedure, not a "contract" with the recipient of ads

Facebook's claim and the assumption in the Draft Report that advertising is a "contract" between advertisers and advertisers is completely absurd. From a purely logical perspective, advertisements aims at initiating a contract and are not itself a contract.

Facebook's Terms of Service also state that Facebook shows "*ads that business and organizations pay us to promote on and off the Facebook Company Products*". It is therefore a contract between Facebook and the advertisers which must be separated from the contract between the user and Facebook pursuant to Article 6(1)(b) GDPR.

We know of no case, where the bothering of a person exposed to ads constitute a "contract":

- No passenger in a bus, train or subway concludes a contract for the advertising displayed there - only a transport contract. It is a result of the right of ownership that every company can stick advertising all-over its buses or trams. Every passenger has the possibility to look at the advertisement or to look out the window.

- No viewer or listener of radio or TV programs concludes a contract over advertising - it is a purely factual procedure on the part of the television or radio station that advertising is displayed, irrespective of paid or free programs. The listener has again the possibility to turn it off or switch to another program.
- No reader of a newspaper subscribes to "advertising", but to news, which are then effectively combined with advertising. However, every user has the possibility to skip the advertisement.
- Finally, no other website known to us (news sites, YouTube, Netflix, etc) concludes a "contract" with the website visitor that the latter has a "right" to advertising. It is a simple factual possibility of the website operator to display advertising and many users actually block the advertising (e.g. by Ad Blockers).

Just like these (and many other) examples, Facebook is of course free to display advertisements on facebook.com, as it has the de facto power over this page. For this, it can also undoubtedly use various techniques of targeted advertising (e.g. geography, language, context, time point).

However, if Facebook also wishes to use the complainant's personal data to fulfil its contract with advertisers, it cannot do so on the basis of Article 6(1)(b) of GDPR, but needs to obtain consent within the meaning of Article 4(11) of the GDPR. As Facebook is of the opinion that this advertising is a "*help"* to "*discover" "interesting*" products (attention: PR speak!) it should not be too difficult to obtain the consent of users.

It is therefore disputed that advertising constitutes a contract - in any event, there is no such industry standard ("Verkehrssitte") and such a contract would in fact be extremely exceptional.

2.1.8. Other processing within the framework of the first part of the Terms of Service are also factual procedures.

Facebook has so far (except for advertising) not provided any information as to which clauses in the Terms of Service are intended to constitute a "contract" and what their specific contractual content should be. The Draft Report did not provide any findings on this either.

However, many of the other points (e.g. research, product improvement or outsourcing of data processing outside the EEA) are also purely factual actions in the sole interest of Facebook and not a contractual "service" to the user. They may therefore also be an situation where Article 6(1)(b) GDPR applies.

Other elements which represent the core product of the platform (e.g. the user's page, exchange of news, contact book, photo uploads) are, according to the public opinion, certainly the subject of the product "social network" and thus the subject of the contract - irrespective of the designation in the clauses.

It is therefore disputed that the other points in the Introduction, Parts 1 and 2 of the Terms of Service are more than a description of factual processing operations. We expressly reserve the right to make a concrete submission as soon as the Irish DPC or Facebook has determined or submitted the concrete processing, legal basis, purposes and data.

2.1.9. Reading the "Legal Basis" document

The Draft Report refers in detail to the information provided to users by a sub-sub-page of the Terms of Service, the so-called "Legal Basis" document. The complainant did not notice this

document and Facebook demonstrably did not proactively inform about such serious changes, but instead denied any major changes.

In order to assess whether the clause was "hidden" or "surprising", it would be highly relevant to determine how many users (1) have read the Terms of Service, (2) have read the Privacy Policy and (3) have read the Legal Basis document and for how long. It can be assumed that Facebook maintains these statistics and would present them if the information on this sub-sub-page had been widely studied.

It is therefore requested to determine the actual use of these pages (especially page visits and the durations of these visits) in comparison with the number of users lead through the "User Engagement Flow". In the event that Facebook does not provide any information in this regard, this would have to be taken into account.

2.2. Missing evidence and findings of fact

To conclude the investigations, it seems that the following matters still need to be investigated:

2.2.1. Concrete legal bases for data processing operations

Although the entire last part of the Draft Report deals with the lack of information on the specific legal basis in the light of Article 5 of the GDPR, the DPC does not make any effort to overcome this lack of information in order to clarify the questions relating to Article 6 of the GDPR.

For the sake of procedural caution, the applications of 20. 8. 2019 will therefore be recalled under point 4.

2.2.2. On the consent to "cookies"

No investigation or submission was found regarding the processing of cookies, even though this is clearly covered by the Terms of Service and the Privacy Policy. Facebook does not claim consent to this in either the Legal Basis document or the Cookie Policy. In fact, cookies on www.facebook.com are already set during the first visit - regardless of whether a user has a profile or logs in. It is also undisputed that Facebook uses this data not only for the service, but also for tracking purposes (e.g. outside Facebook). The Facebook cookie directive, for example, states this:

> *"Cookies also allow us to provide insight into both those who use Facebook products and those who interact with the advertisements, websites and apps of our advertisers and the companies that use Facebook products.*

It is therefore requested to identify the legal basis for this processing.

2.2.3. Specific clauses to which Facebook refers

As already shown under point 2.1.1 and explained in the application of 20. 8. 2019, there is no investigation into the concrete clauses to which Facebook refers to. Therefore, out of procedural caution, the application is also recalled once again under point 4.

2.2.4. Intent of Facebook

Facebook does not argue with a single word what the aim or intent was to switch from Article 6(1)(a) to (b) on 25. 5. 2018. The DPC doesn't seem to have determined this issue either. If there were objective reasons other than the mere circumvention of Article 6(1)(a), Facebook would likely have made submissions accordingly.

It is therefore unlikely that Facebook had any reasons other than the circumvention of Article 6(1)(a) given the chronological and practical sequence of events and for lack of any other evidence or submission.

In order to close these gaps in the factual findings, the authority is requested to investigate the intention ("subjective Tatseite") that lead to this change (e.g. by questioning witnesses).

2.3. New submissions by the complainant

2.3.1. New Terms of Service of 31. 7. 2019

On 31. 7. 2019, Facebook has once again amended her Terms of Service (Annex E). As new facts have to be taken into account according to the AVG, this actual change must be assessed.

It seems particularly relevant that Facebook (contrary to her statements in these proceedings) expressly formulates a declaration of consent to the processing of data for advertising purposes in the introduction and in Part 2 of the new Terms of Service:

> *"By using our products, you agree that we may display advertisements to you that we believe are relevant to you and that match your interests. We use your personal information to determine which advertisements we show you."*
>
> *"Instead of paying to use Facebook and the other products and services we offer, by using the Facebook products to which these Terms of Use apply, you agree that we may show you advertisements that we are paid by companies and organizations to highlight inside and outside of Facebook company products. We will use your personal information, such as information about your activities and interests, to show you advertisements that are more relevant to you."*

As an act of consent, the pure use of Facebook products is mentioned here, which would not even represent an *unambiguous* act of consent.

2.3.2. Affidavit on the consent procedure

As the interpretation of a declaration (regardless of whether consent as defined in Art 4(11) GDPR or a contract as defined in ABGB) depends on the intent of the parties, the complainant has explained her perception of the process of consent within the framework of an affidavit.

In particular, the affidavit in Annex F states:

1) That the complainant had the impression that she was giving consent and that this was in particular due to the design of the "User Engagement Flow".
2) That the complainant still has the impression that she had given consent and that this impression was further reinforced by the new Terms of Service of 31. 7. 2019.

3) That the complainant at no time had the impression of entering into a new contract with regard to content and that the content of Facebook's services had not changed either by 25. 5. 2018 or by 31. 7. 2019.
4) That the complainant knew that before 25. 5. 2018 the processing of her data was based on consent and that there was no (otherwise common) information that this had been changed.
5) That the complainant is not of the opinion that she has concluded an enforceable contract on advertising, research or other data processing in the interest of Facebook.
6) That the complainant is a consumer residing in Vienna.

For further factual evidence, reference is made to the affidavit itself.

2.3.3. Declaration on the representation under Article 80 GDPR

In paragraph 18 of the affidavit, the complainant also clarifies that *noyb* is not limited in any respect when representing the complainant, which was raised by Facebook on page 1 of its submission of 27. 9. 2018.

3. Material Law Submissions

3.1. Introductory remarks

The argumentation of Facebook and the analysis in the Draft Report are in parts so paradoxically and systematically flawed, that a stringent answer is almost impossible. A massive problem of the Draft Report seems to be that it is exclusively relies on a literal interpretation without the slightest attempt to give any logical meaning and basic sense to these words.

A further problem is that an analysis of the Terms of Service as a "contract" as defined by the Austrian General Civil Code ("ABGB") and the Austrian Consumer Protection Act ("KSchG") once again only permits the conclusion that, at best, this is "consent" in accordance with Article 4(11) GDPR. Accordingly, a serious examination of Facebook's arguments under Article 6(1)(b) (to the extent that this is possible at all) leads to numerous back and cross references back to Article 6(1)(a) GDPR.

A strict separation of these two legal thematic blocks is therefore only possible to a limited extent. We therefore ask you to excuse duplications and cross-references in this submission.

3.2. Applicable law: Austrian Law

The Draft Report erroneously assumes (e.g. § 119 of the Draft Report) that Irish contract law would apply to Facebook's Terms of Service. This is disputed.

The CJEU concluded in C-498/16 *Schrems* that private users of Facebook services are "consumers" within the meaning of the Brussels-I-Regulation and consequently also under Article 6 of Regulation 593/2008 ("Rome-I-Regulation"). Austrian law thus applies to the contract.

In point 4 of the Terms of Service, even Facebook now makes clear that "*if you are a consumer and have your permanent residence in a Member State of the European Union, the laws of that Member State apply*". In the case of the complainant (domicile in Vienna), this also leads to the applicability of Austrian law.

There is no argument from Facebook that Irish law would be applicable, which is why the Draft Report of its own motion assumed the wrong applicable law or (as in many other cases) did not specifically review and analyze the content of the Terms of Service.

3.3. Core question: Is a simple "repackaging" of a consent in Terms of Service okay?

Completely irrelevant to the applicability of Article 6(1)(a) is the place or context of the declaration. Consent can be given in the form of buttons, nods, oral statements, inline consents and countless other forms.

It would be downright grotesque if replanting consent in Terms of Service would be sufficient to undermine the provisions of Articles 4(11), 6(1)(a), 7 and 9 of the GDPR. This is especially true in view of the fact that Article 7(2) GDPR now explicitly prohibits the "hiding" of consent in Terms of Service.

However, this is the core argumentation of Facebook - which is on the level of a "shell game player". Since Facebook was apparently able to impress the Irish DPC with these laughable arguments, we took the liberty of presenting the process (for easier understanding) graphically and in animated form:

3.3.1. Graphical representation

Just because a consent is in a contract (Terms of Service), it remains consent and does not itself *become* a civil contract, as you can easily see from this diagram even without legal knowledge:

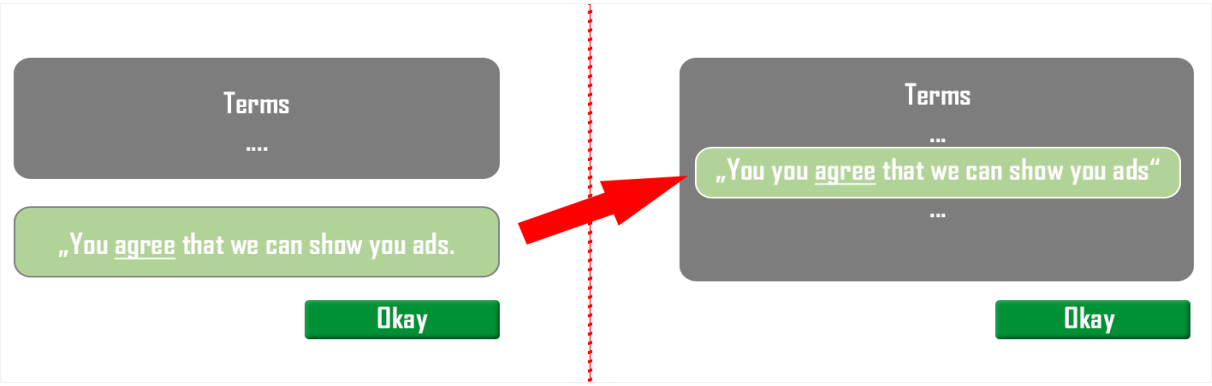
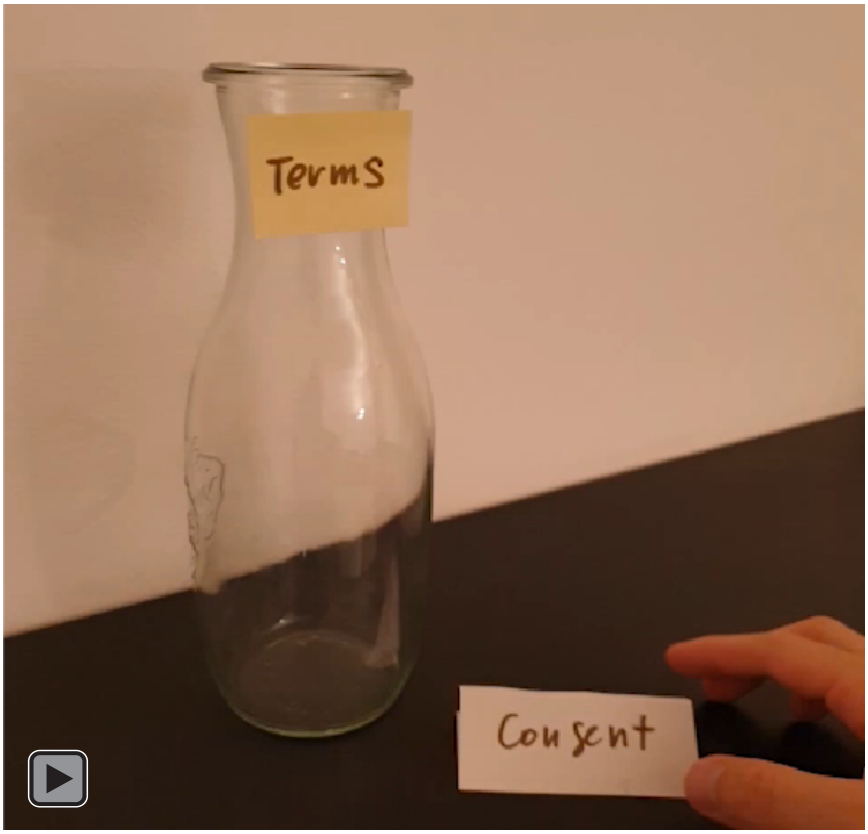


Fig: Left must be free, informed, specific, and unambiguous – The right is unregulated?

3.3.2. Animated presentation

Finally, we take the liberty of presenting Facebook's approach in a video and through a transparent glass bulb, so that even parties without the fully developed ability to object permanence can see that the consent in the Terms of Service has not "disappeared", but continues to exist in the terms:



3.4. Relevant clauses of the Terms of Service are to be treated as "consent"

According to Facebook's submission and the draft report, the core of the procedure is therefore the question of whether a person responsible can circumvent the new provisions of the GDPR which are intended to prevent the "compulsory consent" of the person concerned by "outsourcing" the consent to the contract.

3.4.1. introductory remarks

The following points should be noted in advance:

3.4.1.1. Supposed object of the declaration

Facebook now seems to refer mainly to part 1 of the Terms of Service - possibly also to the introduction and part 2 of the Terms. The legal nature of this part of the Terms is completely unclear (see point 3.6 et seq. below). For long stretches it seems to be:

a) Pure PR claims (e.g. "*Our mission is to give people the opportunity to form communities and bring the world closer together*"),
b) Pure information (e.g. "*Instead, companies and organizations pay us to show you advertisements for their products and services*"),
c) Classic consent claims (e.g., "*By using our products, you agree that we may show you advertisements that we believe are relevant to you and that match your interests*") or
d) Purely factual descriptions that do not imply any performance or duty (e.g., "*We employ specialized teams and develop advanced technical systems worldwide to detect misuse of our products, harmful behavior toward others, and situations where we may be able to help support and protect our community*").

The "Legal Basis" document and § 2.15 of the Facebook statement of 22. 2. 2019 also refers to a "*description*".

A typical contractual wording which imposes clear rights and obligations on the contracting parties can only be found in parts 3 to 5 of the Terms of Service, but Facebook does not currently refer to these parts in the "Legal Basis" document under Article 6(1)(b) (see point 2.1.1).

In the absence of clear submissions and factual findings, it is only possible to take a position on the basis of these speculations. Further submissions are therefore reserved.

3.4.1.2. External act of consent

The external minimum requirements for consent within the meaning of Article 4(10) GDPR and the conclusion of a contract within the meaning of §§ 861 ff ABGB are the same: a simple verbal "yes", a click on an "OK" button or even a nod is sufficient. This is stringent, since both are declarations of a certain will of person concerned or the consumer. To this extent there is also agreement with the Draft Report (see § 87, first sentence).

Uncertainties about the concrete meaning of a declaration, misleading declarations or lack of free will are also not new to the law. Both civil law and data protection law have various mechanisms in place to ensure the freedom and actual conformity of declarations with the intent of the parties (see e.g. rules on interpretation, force, error, fraud).

However, since the rules for the protection of a declaration under Article 6(1)(a) and (b) differ massively from one another, the correct classification of a declaration is a key issue for the application of the GDPR. It is precisely the new, clearer consent requirements of the GDPR that should prevent practices such as those of Facebook.

In the present case, the external act, according to Facebook, is therefore probably various settings in the "User Engagement Flow" and the final click on the "I agree" button at the end of the "User Engagement Flow" (see 2.1.4.4 above).

3.4.1.3. Steps taken by Facebook

To summarize the facts of the case (see in detail point 2.1.4 above), it is absolutely obvious that Facebook has been suddenly invoking 6(1)(b) instead of Article 6(1)(a) from one second to the next at 0:00 midnight on 25. 5. 2018.

At the same time, Facebook publicly stated that no substantial changes will take place, but on the contrary, that users will now have more control.

As part of this process, vague, unclear and euphemistic clauses were inserted in the introduction and part 1 of the Terms of Service, which, compared to the rest of the Terms, do not have the quality of a contract. See e.g. "*We provide you with a personalized experience*". The amendment of the Terms on 31. 7. 2019 added a similarly worded introduction and a new Part 2 to the Terms. There is no indication that the service of Facebook has changed in any way through this addition.

The timing and the logics behind this switch only allows to conclude that this was done with the intention of circumventing the new rights of users under Article 6(1)(a) of the GDPR.

3.4.2. Unanimous legal opinion

In view of the obvious possibility of circumventing the protection of fundamental rights extended by the legislator under Article 4(11), Article 6(1)(a) and Article 7 GDPR, there is rare agreement that a "backdoor" via Article 6(1)(b) should not be possible.

3.4.2.1. Clear position of the Article 29 WP and EDPB

Already the complaint referred to page 8 of WP 259 of the Article 29 of WP 259 under point 2.2.2.

Equally, the EDPB has now dealt with the topic again in Guideline 2/2019.

The EDPB clarifies that the mere "naming" of data processing operations is not sufficient for the applicability of Article 6(1)(b):

> *„27. Merely referencing or mentioning data processing in a contract is not enough to bring the processing in question within the scope of Article 6(1)(b). Where a controller seeks to establish that the processing is based on the performance of a contract with the data subject, it is important to assess what is objectively necessary to perform the contract. This is also clear in light of Article 7(4), which makes a distinction between processing activities necessary for the performance of a contract, and terms making the service conditional on certain processing activities that are not in fact necessary for the performance of the contract. 'Necessary for performance' clearly requires something more than a contractual condition."*

Facebook does exactly that and describes the statements in Part 1 of the Terms of Service as "*Description*" in the "Legal Basis" document and in § 2.13 of the submission of 22. 2. 2019.

Furthermore, Article 6(1)(b) is also clearly excluded as the legal basis for the forms of processing described in the Introduction and Parts 1 and 2 of the Terms of Service:

> *45. (…) In most cases, collection of organisational metrics relating to a service, or details of user engagement, cannot be regarded as necessary for the provision of the service as the service could be delivered in the absence of processing such personal data. Nevertheless, a service provider may be able to rely on alternative lawful bases for this processing, such as legitimate interest or consent."*
>
> *46. The EDPB does not consider that Article 6(1)(b) would generally be an appropriate lawful basis for processing for the purposes of improving a service or developing new functions within an existing service. In most cases, a user enters into a contract to avail of an existing service. While the possibility of improvements and modifications to a service may routinely be included in contractual terms, such processing usually cannot be regarded as being objectively necessary for the performance of the contract with the user."*
>
> *47. […] In the view of EDPB such processing [for fraud prevention purposes] is likely to go beyond what is objectively necessary for the performance of a contract with a data subject.*
>
> *49. As a general rule, behavioural advertising does not constitute a necessary element of online services. Normally, it would be hard to argue that the contract had not been performed because there were no behavioural ads. This is all the more supported by the fact that data subjects have the absolute rights under Article 21 to object to processing of their data for direct marketing purposes.*

In view of the clear opinion of the EDPB, it is inexplicable to us how § 130 of the Draft Report can explicitly take a different view, with the grotesque argumentation that Facebook would have hidden the use of data only in Terms of Service and not in the "*small print*" (sic! , Terms of Service are the "*small print*") – only to come to the conclusion that the examples of the EDPB would not be applicable here.

3.4.2.2. Case Law of the DSB

The DSB's long-standing case law is also clear on this point and has always reviewed consents in Terms of Service based on the criteria for consent - and not as a contract. As an example, the DSB decided in DSB-D216.396/0003-DSB/2017 of 22.05.2017:

> *"The data protection authority... therefore considers it unacceptable in settled case-law to include such declarations of consent under data protection law in Terms of Service (see, for example, the recommendation of the Data Protection Commission of 13 July 2012, GZ K 212.766/0010-DSK/2012). Rather, the customer must be given the opportunity to enter into the desired contract without submitting the declaration of consent under data protection law ("opt-in" solution, e.g. through a design of the Terms of Service in which the declaration of consent is to be clicked separately).*

See also the recent decision in DSB-D213.642/0002-DSB/2018 under the GDPR.

The DSB's comments in its newsletter 3/2019 on the separation between Article 6(1)(a) and (b) are thus also consistent with this case law:

> *"The EDSA states that the data processing in question must be objectively necessary for the performance of a valid contract or a pre-contractual obligation. The mere reference or mention of data processing in a contract as well as the contractual conditions stipulated therein by the responsible party are not sufficient for a processing to be described as necessary within the meaning of Art. 6 para. 1 lit. b GDPR. Instead, the necessity of data processing is assessed according to the integral purpose of the specific service. The data controller should therefore be able to explain how the main purpose of the specific contract with the data subject cannot be fulfilled without the specific*

data processing. This depends not only on the position of the person responsible, but also on the reasonable perspective of the person concerned when the contract is concluded and whether the contract can still be fulfilled without the processing in question".

3.4.2.3. Unanimous view in the legal literature

Likewise, the legal literature is completely unanimous in the clear differentiation between Article 6(1)(a) and (b) or the rejection of circumvention by a contract. We are aware that legal literature has little relevance in Ireland in the interpretation of law, but is a c source of interpretation in Austria:

Jan Albrech (rapporteur of the GDPR) / Florian Jotzo, The new EU data protection law, Article 6, § 44:

"The GDPR sets narrow limits for such business models of many online providers. Art. 6 para. 1 lit. b GDPR is usually not a legal basis, since providers such as Facebook typically use data about their users for advertising purposes, which is not necessary for the fulfilment of the contract in the actual sense".

Cooling/Buchner, DSGVO-BDSG[2], Article 7, § 50:

"Neither is it necessary to evaluate clickstream, communication, contacts and other information about the users for commercial purposes and to transmit it to third parties for the provision of the basic functions of a social network.

Ehmann/Selmayr, Datenschutzgrundverordnung, Article 6, § 13:

"However, the retention of customer preferences for marketing purposes is not necessary for the performance of the contract."

Wendehorst / Count of Westphalia in NJW 2016, 3745:

"A provider cannot therefore rely on Article 6 I(b) of the GDPR, for example, if a certain aspect of its own service was obviously arbitrarily "promised" solely because the provider wanted to process additional user data in this way.

"Another approach is the idea of the effet utile combined with the consideration that the complete undermining of the protective mechanisms formulated in detail, in particular in Art. 7 and 8 GDPR - in that the contract declaration to be issued informally together with other contents, not freely revocable and unencumbered by a prohibition of linking replaces the consent under data protection law - can hardly correspond to the will of the legislator. This consideration leads to a teleological reduction of Art. 6 I letters b and f GDPR or, in the terminology of the ECJ, to a restrictive interpretation".

Peter Carey, Data Protection, 5th Edition, page 55:

„Processing by a controller will not be necessary for contractual performance where the contract could reasonably be performed in some other way without the need for such processing."

Rücker/Kugler, New European Data Protection Regulation, § 371

„…fraud prevention or customer profiling would be typically beyond what is strictly necessary for the actual performance of a sales contract."

3.4.2.4. Clear Case Law

Austria

In its extensive case law, the Austrian Supreme Court (OGH) has so far had to judge almost exclusively declarations of consent in Terms of Service. Although the Supreme Court has clearly

recognised these clauses as part of the contract (as otherwise a challenge under § 28 KSchG would normally not be possible), it has never even just embarked on the idea of assessing them on the basis of Article 6(1)(b) GDPR. These clauses were always assessed on the basis of the provisions on valid consent pursuant to Article 6(1)(a) GDPR and the preceding provisions in Directive 95/46/EC and the Austrian Data Protection Act of 2000 ("DSG 2000"). See e.g:

OGH in 6Ob140/18h generally to consent in Terms of Service:

> *"4.2.1. the Supreme Court has ... dealt on several occasions with the assessment of consents to the transfer of data in Terms of Services (see RIS-Justice RS0115216 and RIS-Justice RS0111809)."*

OGH in 6 Ob 140/18h ("Simpli TV") on invalid data transfer clauses in Terms of Service according to the new legal situation under Article 7 GDPR:

> *"When linking consent to the processing of non-contractual personal data with the conclusion of a contract, it is to be assumed in principle that consent is not given voluntarily unless special circumstances in individual cases indicate a voluntary nature of the Previous search term data protectionNext search term consent (see Ehmann/Selmayr/Heckmann/Paschke, DS-GVO Rz 52 ff). However, such circumstances were not put forward in the present case."*

Further Supreme **Court** rulings can be found, for example, in 4 Ob 228/17h where a controller again claimed that the consent clause in Terms of Service was only "information" and therefore should not be treated according to the rules on consent.

There are countless other rulings in which the Supreme Court has also dealt with consents in general terms and conditions. Neither factually nor legally does the present case deviate from the case law of the Supreme Court. Therefore consent in Terms of Service is to be assessed according to Article 6(1)(a) under this case law.

Germany

Likewise, the courts in Germany have examined consents in Terms of Service according to the provisions on consent - not according to the provisions on declarations of intent under civil law.

See for example, the German Supreme Court ("BGH") in its judgment VIII ZR 348/06 of 16. 7. 2008 ("*Payback*") on a consent to SMS or e-mail marketing in Terms of Service (here disputed: opt-in/opt-out).

3.4.2.5. Summary: Unanimous legal view

In rare cases, supervisory authorities, supreme courts and academics apply Article 6(1)(a) GDPR or its predecessor provisions in Article 7(a) of Directive 95/46/EC to declarations of intent under data protection law.

3.4.3. Legal Doctrines

Although the data protection authorities (now with the now notable exception of the Irish DPC), the courts and the legal literature rarely agree that it is not possible to circumvent the strict requirements for consent by consenting to Terms of Service, a final agreement on a legal concept that leads to this finding has not yet been reached. We have therefore taken the liberty of summarising the existing approaches in the following:

3.4.3.1. Introduction: Different types of declarations

Consent is just as much a declaration as the acceptance of a civil law contract. The question "Do you want X?" and the answer "Yes" result in a contract (§ 883 ABGB) as well as a consent (Article 4(11) GDPR). Both are free of form (e.g. nodding as an assumption, § 863 ABGB).

There is therefore no direct difference between a declaration under Article 6(1)(a) and 6(1)(b) GDPR from the external process (offer and acceptance), as these examples show:

- Example 1: "May we set a cookie?" - "Yes!"
- Example 2: "May we use your data to personalize advertising?" - "Yes!"
- Example 3: "Would you like to rent this bike?" - "Yes!"
- Example 4: "Would you like to rent this electric scooter through an app?" - "Yes!"

It is obvious that examples 1 and 2 are consent within the meaning of Article 4(11) GDPR and examples 3 and 4 are a contract ("*If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck*").

However, since the Draft Report and Facebook obviously have conceptual difficulties in differentiating, the correct distinction unfortunately seems to require further elaboration.

3.4.3.2. Subject matter of the declaration: Data processing

The above four examples of declarations have a clear difference: the subject matter of the declaration of intent in the first two cases is primarily data processing in the second two cases is primarily some other contractual service.

Literal meaning, intention and purpose of the clauses in question

Based on to the wording used by Facebook, the intention and purpose and the context of the insertion of this part on 25.5. 2018, the content of the declaration in the many clauses in Part 1 of the Terms of Service is obviously about data processing and not a "new" contract, e.g. for advertising, development and information services to the user.

Even if there were a difference between the wording and the obvious intention and purpose, according to § 914 ABGB the will of the parties is to take precedence over the wording of a declaration ("*When interpreting contracts, the literal sense of the term is not to be used, but the intention of the parties is to be explored and the contract understood as it corresponds to the practice of fair dealing*"). This principle is well known throughout the common tradition of European civil law systems (see point 3.6.5 below).

No modification of the content of the contract by new clauses

The actual content of the amendment can also be determined by omitting the relevant parts of the Terms of Service. On 25. 5. 2018 the Terms of Service were updated and in particular Part 1 of the Terms of Service was newly added, with the amendment of 31. 7. 2019 the Introduction and Part 2 of the Terms of Service were added. However, the "contract" with Facebook and the service have remained the same.

The provisions therefore have no effect on the content of the service or contract, but interestingly (according to Facebook) on the use of personal data.

It follows, that the added parts of the Terms of Service clearly concern data protection issues only.

Economic reality

As Facebook itself explains, the relevant data processing is not carried out as a contractual service to the user, but for refinancing and contract fulfilment with third party advertising partners.

3.4.3.3. Article 6(1)(a) is a *lex specialis*

As is the case with other declarations (e.g. wills, gifts, arbitration clauses, living wills, voting rights), the legislature may issue special provisions for certain types of declarations.

Especially in the area of fundamental rights (e.g. the right to vote, the right to life, the right to a fair trial), it is typical that clearly increased requirements for form, freedom, information and commitment are demanded in order to effectively protect the fundamental rights of the person concerned. The provisions of the GDPR follow this fundamental rights logic and tradition.

The fact that declarations concerning data protection fall under Article 6(1)(a) can already be derived from the definition in Article 4(11), which defines consent as "the *expression of consent by which the data subject indicates that he or she consents to the processing of his or her personal data*".

The content of the declaration is therefore the primary factor which distinguishes between the *lex specialis* in Article 6(1)(a) and the general rule in Article 6(1)(b) GDPR. Any expression of a person's wishes which is concerned with consent to data processing must therefore be assessed in accordance with Article 4(11) in conjunction with Article 6(1)(a) and Article 7 of the GDPR.

3.4.3.4. Inadmissibility of circumvention and abuse of rights

The invalidity of circumvention can also be derived from numerous European and national legal systems. Article 5 GDPR already requires processing to be carried out "*lawfully*" and in *"fairly"*.

In its long-standing case law, the CJEU has developed the principle that "*according to settled case-law an [...] abusive recourse to Community law is not permitted*" (see e.g. C-255/02 *Halifax*, para. 68, with further references). In more detail, see C-251/16 *Cussens*, para. 30 to 32:

> *"30 Secondly, it is apparent from the Court's case-law that the principle that abusive practices are prohibited is applied to the rights and advantages provided for by EU law irrespective of whether those rights and advantages have their basis in the Treaties (see, so far as concerns the fundamental freedoms, inter alia judgments of 3 December 1974, van Binsbergen, 33/74, EU:C:1974:131, paragraph 13, and of 9 March 1999, Centros, C-212/97, EU:C:1999:126, paragraph 24), in a regulation (judgments of 6 April 2006, Agip Petroli, C-456/04, EU:C:2006:241, paragraphs 19 and 20, and of 13 March 2014, SICES and Others, C-155/13, EU:C:2014:145, paragraphs 29 and 30) or in a directive (see, in relation to VAT, inter alia judgment of 3 March 2005, Fini H, C-32/03, EU:C:2005:128, paragraph 32; judgment in Halifax, paragraphs 68 and 69; and judgment of 13 March 2014, FIRIN, C-107/13, EU:C:2014:151, paragraph 40). It is thus apparent that that principle is not of the same nature as the rights and advantages to which it applies.*
>
> *31 The principle that abusive practices are prohibited, as applied to the sphere of VAT by the case-law stemming from the judgment in Halifax, thus displays the general, comprehensive character which is naturally inherent in general principles of EU law (see, by analogy, judgment of 15 October 2009, Audiolux and Others, C-101/08, EU:C:2009:626, paragraph 50).*
>
> *32 It should also be added that, according to the Court's case-law, refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are*

not, in fact, met, and accordingly such a refusal does not require a specific legal basis (see, to that effect, judgment of 14 December 2000, Emsland-Stärke, C-110/99, EU:C:2000:695, paragraph 56; judgment in Halifax, paragraph 93; and judgment of 4 June 2009, Pometon, C-158/08, EU:C:2009:349, paragraph 28).”

In particular, the last paragraph shows the classification of the doctrine by the CJEU: The abuse of rights leads to the lack of any objective law in the first place.

Similarly, the CJEU has already rejected "*artificial arrangements*" for circumventing the law (C-196/04 *Schwepps*) and undermining laws (C-44/96 *Mannesmann*, para. 43).

The interpretation of the GDPR under the *effet utile* doctrine leads to the same result, as interpreted in the long-standing case law of the CJEU: An “undermining" of the law in Article 6(1)(a) via a fictitious contract undermines the effect of the rules in Articles 4(11), 6(1)(a), 7 and 9 of the GDPR.

Equally §§ 879 and 916 ABGB include clear prohibitions of circumvention and fictitious transactions and the obligation to judge these according to the true circumstances (in this case according to the rules for a data protection consent), see below at point 3.6.6.

This principle is also a fundamental pillar of any civilised legal system. Projects to codify the common principles of European civil law therefore consistently include a corresponding regulation (see e.g. Principles of European Contract Law Article 6:103: "*When the parties have concluded an apparent contract which was not intended to reflect their true agreement, as between the parties the true agreement prevails*").

3.4.3.5. Prohibition in Article 7(2) GDPR

Article 7(2) of the GDPR explicitly states that the legislator discouraged embedding consent in Terms of Service. It would go against the whole system of the GDPR and it would be utterly absurd if precisely this were to be circumvented by "data processing contracts" in Terms of Service.

The legally prohibited process of "hiding" (planted) declarations which extensively undermines the fundamental right to data protection does not change even if this is done under the pretext of Article 6(1)(b) instead of Article 6(1)(a) GDPR.

In any case, this would constitute a circumvention transaction that would be inadmissible according to the principles of the European Court of Justice (see point above).

3.4.3.6. Core service, contractual service and user interest in data processing

In order to separate the core business from the bypass business, various arguments have been developed which, however, are probably congruent in their practical significance.

The separation into "*core service*" and "*imposed, atypical other elements*" in the interest of the responsible party practically defines the red line between (1) the legitimate contract to which there is an implicit consent by contract conclusion and (2) the part of the contract that is objectively to be seen as circumventing the consent (see point 3.4.3.4). Various approaches have been developed for this separation:

In the literature (see e.g. above *Wendehorst/Graf von Westphalen)* and also in the Guideline 2/2019 of the EDPB (as also explained in the Newsletter 3/2019 of the DSB) the idea of a core service is propagated, to which in turn there is an artificially added "service" in the interest of the

controller in order to circumvent Article 6(1)(a) ("imposed data processing"). In the complaint, the same thought is positively formulated as regards the processing in the interest of the user. *Buchner/Petri* in *Kühlung/Buchner* talk, for example, of "characteristic elements of the contract", Article 6, § 39 (a concept which is very common in international law, see, for example, Article 4(2) of Regulation 593/2008 "Rome-I-Regulation").

Similarly, the approach of the EDPB, according to which the contract within the meaning of Article 6(1)(b) must be interpreted in the light of the "*mutual perspectives and expectations of the contracting parties*", which the Draft Report also correctly quotes (§ 125) - even if this is not applied later.

Especially when our complaint referred to the "interest of the user", this does not mean exclusively data processing for the advantage of the user (bizarrely misunderstanding § 133 and 134 of the Draft Report). The user also has an interest, for example, in payment data being processed in order to process a purchase contract. Of course, the payment is in the interest of the user, even if the loss of money is probably a "disadvantage". However, any kind of secondary data processing (e.g. use for third-party advertising, selling the data) is probably not in the interest of the contracting parties.

These approaches are also legally stringent, as Article 6(1)(b) is logically based on the implicit consent of the contracting party to the necessary data processing - and not on the interests of third parties (e.g. Article 6(1)(c) to (f) GDPR). If a contractual relationship is now used to enable a compulsory consent instead of an implicit consent, the logical basis of Article 6(1)(b) is disturbed.

Exactly such an unwanted consent is generated by Facebook through the clauses in the Terms. Facebook is of the opinion that the introduction, part 1 and 2 of the Terms of Service would define new and unusual "services" in the contract, which allow processing solely in the interest of Facebook. In practice, this also results in a clear overlap with provisions on "unusual clauses" in § 864a ABGB (see in particular point 3.6.6.1).

For the present case, all approaches probably come to the same result and separate the core services of a social network (e.g. own page, news, photo uploads) from the processing in the sole interest of Facebook (e.g. advertising, product development).

The Draft Report (especially in § 132 to 134) again seems not to make a correct classification of this telelogical argument and presents as a counterargument again only the literal wording of Article 6(1)(b) - in which of course there is no mention of core services or the interests of the parties, since these are elements of a teleological interpretation of the text.

3.4.3.7. Teleological interpretation

Above all, an interpretation according to the purpose of the GDPR clearly shows that a "circumvention" of the provisions in Articles 4(11), 6(1)(a), 7 and 9 of the GDPR via Article 6(1)(b) cannot be reconciled with the spirit and purpose of the new provisions.

The GDPR expressly set itself the goal of prohibiting forced pro forma consent ("*take it or leave it*") by monopolists such as Facebook with the provisions of Articles 4(11), 6(1)(a), 7 and 9 of the GDPR. When the Draft Report and Facebook now argue a "backdoor" via Article 6(1)(b), it not only undermines the rights of those concerned, but also mocks the clear will of the European legislator.

It would be easy to simply conclude a "mini-contract" for each consent in order to circumvent the regulations of the GDPR. A new type of some "website visit contract" would probably become a legal trendsetter in the milieu of GDPR bypassers.

3.4.3.8. Systematic interpretation

Finally, a systematic interpretation also requires a distinction to be made between Article 6(1)(a) and (b). The legislator has clearly assigned a data protection declaration of intent to Article 6(1)(a) and clearly separated it from the cases of necessity to fulfil the contract in the definition and in the legal consequences.

3.4.3.9. Rule on Ambiguity (Article 5 of Directive 93/13 and § 915 ABGB)

According to Article 5 of Directive 93/13/EEC (the "Unfair Terms Directive"), Terms of Service are to be interpreted in the interests of the consumer in the event of ambiguities. This is standardised throughout Europe. Insofar as relevant provisions of the Terms of Service are ever to be interpreted as a "contract" within the meaning of the Austrian Civil Code (see section 3.6), they are therefore to be interpreted as "consent" in case of doubt due to the significantly better legal position of the parties concerned. § 915 ABGB leads to the same result.

This rule is also found in Irish law in Section 5(2) of the S.I. No. 27/1995 - European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995.

3.4.3.10. Interpretation in the light of fundamental rights

The need for a legal basis is protected by in Article 8(2) CFR. While Article 8(2) of the CFR allows for "*other legitimate legal basis*", Article 52 of the CFR provides that an interpretation in conformity with fundamental rights is to be applied, which also argues against erosion of consent to a contract.

3.4.3.11. Other principles of the GDPR

Article 5(1): Fairness

A circumvention of Article 6(1)(a) is probably a prime example of an “unfair” use of personal data under Article 5(1) of the GDPR.

Article 5(1): Transparency

Similarly, Facebook's approach to say that there was "no change" and not to mention the switch from Article 6(1)(a) to (b) in the "User Engagement Flow" violates the principle of transparency.

Article 12: Easily accessible information

The transparency requirement in Article 5(1) is also pursued further in Article 12 GDPR, according to which the person responsible must explicitly provide information in "easily accessible form".

The only document Facebook puts forward to prove the complainant's alleged information about the alleged change of legal basis is the hard-to-find sub-sub-page on "legal basis", which is anything but an easily accessible form, especially given the severity of the change (see point 2.1.4 above).

3.4.3.12. Summary

In summary, there seem to be different dogmatic derivations at the moment, but they all come to the same result: A circumvention of Article 6(1)(a) via an artificial "contract" or the mere mention of data processing in Terms of Service is not possible and unlawful.

3.4.4. Rejected approaches in the Draft Report and by Facebook

In any case, the following approaches in the Draft Report and in Facebook's submission are to be rejected:

3.4.4.1. Draft Report's core argument: "Self-healing consent"

In any case completely misguided, is the core argument of the Draft Report (e.g. in §§ 87 ff, 95 or 101 to 103) according to which consent under Article 4(11) GDPR cannot be given because Facebook has not (sic!) complied with the conditions in Article 4(11).

The scope of the law and legal conditions must be separated

Now it can certainly be said that the legislator has not ideally separated the elements of the scope (*"expression of will by which the data subject indicates his consent to the processing of his personal data"*) and the classical four conditions of validity (free, specific, informed and unambiguous) in the legal text of Article 4(11).

It is therefore for the user of the law to interpret that provision correctly and in accordance with the meaning of the provision - in order not to arrive at clearly absurd results through a mindless word interpretation.

We therefore took the liberty to separate the elements into two nice columns:

Scope	Requirements for Validity
"consent" of the data subject means any (...) expression of the will of the data subject in the form of a statement or any other unambiguous confirmatory act by which the data subject indicates his or her consent to the processing of his or her personal data;	(1) voluntary (2) for the specific case (3) in an informed manner and (4) unambiguously delivered

Once the elements of the law are applied in the correct order, the results will also be in line with the legislator's obvious intent and basic logic.

Teleological interpretation

To come up with the crazy idea that a violation of the conditions of consent automatically leads to the inapplicability of these conditions is a legal shot in the foot.

The approach in the Draft Report is also an open invitation to abuse of rights. The GDPR had the express aim of eliminating hidden legal bases in Terms of Service. It would be absolutely grotesque for these clauses to be waved through as a "contract" under Article 6(1)(b) precisely because they infringe all the provisions of Article 6(1)(a).

Given the purpose of the law it is impossible to assume that the European legislator intended such an outcome.

Systematic interpretation

Similarly, a systematic interpretation already shows that consent that does not fulfil these conditions should also be covered by Articles 6(1)(a) and 7 GDPR. Otherwise, for example, the repetition of "*certain purposes*" in Article 6(1)(a), the information in Article 7(2) and the voluntary nature in Article 7(4) of the GDPR would have no scope if such "consents" had already been excluded from the scope of the scheme.

Therefore, it is also necessary to distinguish between the scope of application of the provisions on "consent" in the sense of a declaration of intent under data protection law and the conditions of validity, which can also lead to invalid consent.

Alternative: "Self-healing" consent?

The approach in the Draft Report is also completely grotesque because the failure to fulfil the conditions for consent as defined in Article 4(11) of the report leads to the inevitable classification of this declaration of intent as a "contract" as defined in Article 6(1)(b).

Therefore, under the DPC's legal test, consent can *never* be unlawful, because once the declaration is not free, informed, specific or unambiguous, it no longer meets the definition of the *lex specialis* in Article 6(1)(a) and is therefore considered as a declaration in a contract under Article 6(1)(b).

Legal Test in Draft Report

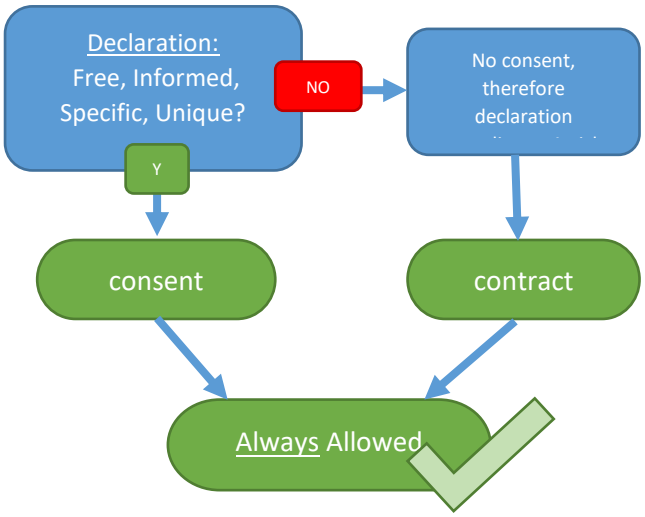


Fig. 1: "*Self-healing*" test in the draft report

Legal Test in the GDPR

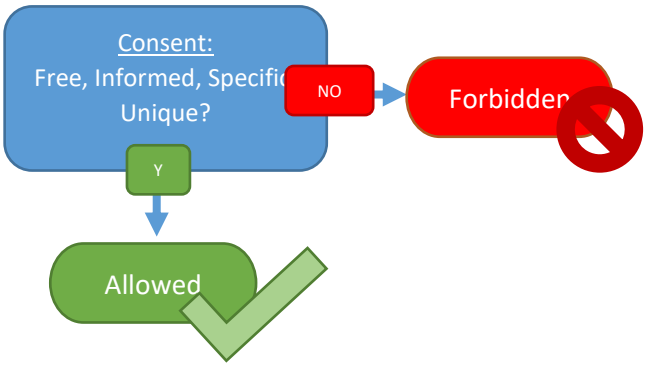


Fig. 2: Test in the law

Such a Kafkaesque legal idea cannot possibly be the intent of the legislator. The draft report's approach is (with all respect) so absurd that the thought alone inevitably causes deep pain for any informed reader. We would therefore ask the DSB in particular to rule out any misunderstandings or translation errors.

3.4.4.2. "Self-healing Terms of Service Hideaway"?

The Draft Report wipes away the question of "hidden consent" without real argument in § 121 by simply referring to the "Part F" of the complaint (so the argument of "self-healing consent").

The logic here therefore seems to be that, if consent does not comply with Article 4(11) GDPR, cannot be consent and therefore cannot be "hidden" in Terms of Service.

This would also lead to the invention of a "self-healing Terms of Service hideaway", because consent to Terms of Service is not permitted under Article 7(2) of the GDPR - and thus, according to the logic of the Draft Report, no "consent". The hideaway in the Terms of Service would "heal itself" just like any other unlawful consent.

Since the reasoning seems to be misguided for the same reasons, we refer to point 3.4.4.1 above.

3.4.4.3. Irrelevance of the heading of a document

In any case, irrelevant to the interpretation of a clause as consent or contract is the title of the document in which the clause is located. Regardless of whether this document bears Terms of Service, "terms of use" or any other title, only the content of a declaration is relevant. Each clause of a document must be checked individually.

For example, the Austrian Supreme Court (see point 3.4.2.4 above) has judged declarations of consent in Terms of Service many times and has consistently applied the provisions on consent. The respective clause was isolated and individually checked throughout. Otherwise, the backdoor would be open to a simply label fraud.

This equally results again from the general interpretation rules according to the ABGB (see below in particular point 3.6.5).

3.4.4.4. "Choice" is not a right of one-sided interpretation.

The Draft Report completely misconstrues the view that Facebook can freely decide on the interpretation of a clause as Article 6(1)(a) or (b) GDPR.

A controller can choose between existing legal bases (under a quite controversial opinion), but these must clearly exist as such just in advance.

What exists legally between the parties, however, is not to be judged freely according to the wishes and views of Facebook, but according to the legal analysis of the declarations.

It is therefore not possible to unilaterally reinterpret a declaration to be a contractual declaration, as this does not constitute a choice between (existing) legal basis, but a declaration by the person concerned would be unilaterally assumed to have a different legal meaning. There is no room for a one-sided reinterpretation of a declaration in Article 6(1) of the GDPR.

Put simply, if the controller has two slips of paper (a contract and a consent), he can chose which one to rely on. However, he cannot consider a "consent form" as a contract in order to escape the provisions of Article 6(1)(a) of the GDPR.

3.4.5. Summary and consequence of classification as consent

According to prevailing legal literature, case law of the courts, guidelines of the EDPB, previous case law of the DSB and all logical legal interpretations, a declaration on data protection issues in Terms of Service remains "consent" according to Article 4(11) GDPR. Any classification as a contract is therefore expressly disputed.

As the Draft Report (see e.g. § 95 and 103) correctly states, Facebook's conduct is a clear violation of the consent provisions in Articles 4(11), 6(1)(a), 7 and 9 GDPR (if these provisions were correctly applied). We have nothing further to add to this.

If the clauses are correctly classified as "consent", Facebook lacks a legal basis for those processing operations under Article 6(1) GDPR, which is why these operations must be prohibited.

3.5. *In eventu:* Subjective impression of the user

If the authorities come to the conclusion that, despite the arguments in point 3.4, there would objectively be no "consent", it would have to be examined whether an good faith recipient of the declaration could not have assumed consent. In particular, it should be noted that the ambiguity rule in Article 5 of Directive 93/13/EEC or in § 915 ABGB would have to be applied.

We expressly believe that there is already an objective 'consent' (point 3.4), which would render point 3.5 of the opinion obsolete.

3.5.1. Subjective impression is not determined by "Legal Basis" document

The approach in § 167 of the Draft Report is completely absurd, according to which it was impossible for the user to give the impression of consent, since the sub-subpage on the "legal basis" would refer to the use of Article 6(1)(b) GDPR.

Exactly this information has not been given to the user who is going through the "User Engagement Flow" (see above the application to collect the actual number of hits). Given the absence of this information in this "flow", the user has the impression that he is giving consent, as he is not prompted to click through two sub-pages to see the "true" meaning of the declaration.

If, however one is overly detail-oriented, it should also be noted that the "Legal Basis" document in particular explicitly confirms that all "*additional information resources"* linked by the Terms of Service should also constitute a basis according to Article 6(1)(b). The most prominent linked document here is the Privacy and Cookie Policies, which would therefore have to be re-examined under Article 6(1)(b) GDPR.

Even more grotesque is the argument in § 172 according to which an average user could never see a consent in Terms of Service as consent, since this consent does not fulfil the requirements of Article 4(11). It must be ruled out that an average user (a) sits in front of Facebook armed with the definition of Article 4(11) GDPR and (b) comes up with the grotesque legal idea of the DPC that a consent that does not comply with the requirements should be a contract (see above point 3.4.4.1 on "*self-healing consent*").

The user's impression is not to be judged by any sub-sub-pages and the definition in Article 4(11), but by the "user engagement flow" only.

3.5.2. Impression form the "User Engagement Flow"

As in all other areas of law (insurance law, banking law, etc.), an average consumer should be assumed to be reasonably circumspect and attentive.

As described under point 2.1.4 the user is guided through 21 pages. Only at the end does he end up on a page that is titled (1) "*Terms of Use, Privacy Policy and Cookie Policy*" (2) also links to all three documents and (3) has a "I Agree" button at the end.

Even if the small grey text (see the deceptive design of the text above point 2.1.4.4) only speaks of consent to the Terms of Service, the overall impression of a user who has to click his way through 21 pages is that he has given his data protection consent here.

It should also be borne in mind that during the introduction of the GDPR there was a the flood of request for consent that users had to sign, and that 20 screens with consents were previously shown in the "User Engagement Flow". Added to this is the extremely unusual supposed "contract design" of Facebook, which contradicts every custom (see points 2.1.7 and 2.1.8 above). The average user is therefore conditioned on consent to data processing, gives consent on 20 pages and should now recognize on the last page to be a "conclusion of a contract on data processing" under Article 6(1)(b).

It is fair to assume that 99% of users fail to differentiate these legal meanings. Thus, the complainant also had the impression that she consented and not that she has concluded a new contract on data processing services (see affidavit – Annex F).

Since it can be assumed that Facebook has designed and extensively tested this "user engagement flow", it is up to Facebook to provide evidence that this effect neither happened, nor was it deliberately provoked (e.g. by the design of the text).

3.5.3. No hint at extremely extraordinary content and active information that no change was taking place

If a controller were to make such a switch from Article 6(1)(a) to (b) in a fair and transparent way (Article 5(1) GDPR), he would clearly and unambiguously point this switch out. This was not done.

To the contrary, as stated in point 2.1.4.2, Facebook has said that "*no change*" is taking place and Facebook is taking the opportunity to "*invest even more in privacy*".

3.5.4. New consent clauses in the Terms of Service of 31. 7. 2019

This subjective impression was further reinforced by the clauses in the new Terms of Service of 31 July 2019: "*By using our products you agree that we may show you advertisements*" and "*Instead of paying ... by using the Facebook products ... you agree that we may show you advertisements*".

In the event that the authorities do not in any case objectively assess this clause as consent, it would in any case be seen as consent from the subjective view of an average consumer.

3.5.5. Summary

In summary, it can be assumed that the majority of all average users only saw the three documents and the words "I agree" on the final screen, after clicking through more than 20 steps.

As Facebook justified the changes with the GDPR and users were confronted with masses of requests for consent during this time, the subjective impression of another consent had to arise. In the absence of a clear explanation and active information that "no change" is taking place, such a misunderstanding could also be attributed to Facebook (analogous to §§ 864a, 871 915 ABGB).

3.6. *In eventu:* Irrelevance of clauses under Austrian Civil Law and EU Consumer Law

Only in the event that the Irish DPC maintained its view that Article 6(1)(a) of the GDPR was not relevant in this case the following questions would arise.

Of course, there is a contract between the complainant and Facebook for the use of the undisputed parts of the social network (e.g. messenger, posting, photo albums). Only the additional use for purposes described in the Introduction, Parts 1 and 2 is disputed.

We expressly believe that Article 6(1)(b) is not applicable in relation to the Introduction and Parts 1 and 2 of the Terms of Service (see point 3.4). However, out of procedural caution, we submit the following on the Introduction, Part 1 and 2 of the Terms of Service:

3.6.1. Necessity to assess the contract

The concrete analysis of the "contract" as a preliminary question (§ 38 AVG) is indispensable for the assessment under the GDPR. A rental agreement makes other processing "necessary" than buying a bread roll in a supermarket, for example. An invalid contract on the other hand (a "legal nothing") does not make any processing "necessary" at all.

The Draft Report is limited to a statement that "(*a*) *contract*" has been concluded. Not a single word can be found on the content, scope, validity and the "*necessary*" processing steps (according to data processed and purpose) referred to in Article 6(1)(b).

Facebook also does not make any submissions about the specific clauses and processing operations covered by the respective clause, which is why only the analysis of the "contract" above under point 2.1.1 is possible so far.

3.6.2. Classification of the declaration under the ABGB: Consent

As stated above, a civil law examination would have to be carried out exclusively under Austrian civil law (see point 3.2 above).

Also in the context of an analysis on the basis under Austrian civil law the question of the classification of a declaration arises again. Not surprisingly, there is no other result here than already mentioned under points 3.3 to 3.5: Also under all rules of interpretation of civil law the declaration has to be viewed as consent under Article 4(11) GDPR.

If, however, the applicability of Article 6(1)(b) of the GDPR was hypothetically assumed and for the sake of the argument, the following steps would in any case have to be determined or examined:

3.6.3. "Necessity" within the meaning of Article 6(1)(b)

Necessity in the Draft Report

The statements in § 127 of the Draft Report are completely rejected, according to which (i.) "implicit necessity" (whatever that means?) would also be included (ii.) the CJEU has not yet developed the concept of "necessity" (iii.) the definition of a "contract" would have to be assessed according to the Oxford English Dictionary and not according to the applicable civil law, (v.) according to which the aforementioned information obligations in specific consumer contracts aid an interpretation for the GDPR, (vi.) according to which principles of Irish law would be applicable, (vii.) that any voluntary elements outside the contractual obligations also fulfil the criterion of "necessity", which is possible, (viii.) that Terms of Service would not be "unilaterally imposed" because they are "common", (ix.) that unilaterally imposed clauses should also be able to circumvent Articles 6(1)(a), (x.) the legal certainty is interpreted as a factor for the responsible party - but not for the consumer, which is contrary to Directive 93/13/EEC especially when the responsible party uses unclear Terms of Service and (xi.) according to which the rest of the GDPR would be relevant here.

The climax of the absurdity, however, is reached in § 128 of the Draft Report, according to which data processing which is not *essential* shall also be "necessary" in the sense of Article 6(1)(b).

"Necessity" in European law is crystal clear

Particularly strange is the comment in the Draft Report that the "*necessity*" has not yet been developed by the CJEU - if this is one of the three elements of any proportionality test under Article 52(1) of the Charter of Fundamental Rights and as assessed in countless judgments (such as C-293/12 and C-594/12 *Digital Rights Ireland* and *Seitlinger,* paragraphs 46 and 51). Since the GDPR regulates interventions in the fundamental right to data protection (Article 8 CFR), there is automatically an obligation to interpret it in conformity with fundamental rights.

Processing which is not strictly "necessary" for a contract would automatically imply a violation of Article 8 in conjunction with Article 52 CFR as it would not pass a proportionality test.

3.6.4. Step 1 - Existence of a contract

As a first step, one would have to check whether those clauses of the Terms of Service on which Facebook invokes itself are to be qualified as a "contract" within the meaning of the ABGB. Largely, the clauses probably already fail at this fundamental examination.

3.6.4.1. Seriousness and Commitment (§ 869 ABGB)

A bona fide declaration recipient must assume that Facebook wants to be bound by the clauses under civil law (see e.g. *Rummel/Lukas*, ABGB4, § 869, Rn 4).

Purely promotional statements ("*Best Schnitzel of Vienna*" or "*Parship: Get to know singles who are really interested*") do not fall under the category of serious statements if it can be assumed that they are not aimed at bringing about the respective legal consequences. Otherwise, in the above example, Parship would be in breach of contract if someone on the platform met another single who was not "really interested" or if a customer objectively found better schnitzel in another inn.

Objectively not serious

Statements like "*We connect you with people and organizations that matter to you*" can't be the subject of a contract, because Facebook surely doesn't want to commit itself to connecting every user with organizations that matter to that user. It's a promotional statement, just like "*We ... are developing advanced technologies*" or "*Your experience on Facebook is different from anything else*".

In the experience of the user not serious

In other areas, the learned user of Facebook is probably in fact aware that statements like "*We provide global access to our services*" cannot be serious because the platform is blocked in some countries of the world (e.g. China or Iran). If these statements were part of the contract, Facebook would be inherently in breach of contract with any user residing in these countries.

It is also known that Facebook notoriously does not pursue abuse on its platform despite reports by users. If a statement such as "*We fight harmful behavior and protect and support our community*" were part of the contract, Facebook would be in breach of contract in any case of an erroneous deletion of a posting.

Culturally not serious

There is also a cultural difference between Europe and the USA. Many statements by US corporations are deliberately interspersed with euphemisms and exaggerations. This also applies to Part 1 of the Terms of Service (e.g. "*Our mission is to give people the opportunity to form communities and bring the world closer together*").

Here, too, a bona fide reader will not assume Facebook's willingness to commit to any legal obligation. Otherwise, Facebook would be contractually obliged to objectively shorten the distance between - for example – Dublin and San Francisco.

"Blah-blah" statements

Finally, Part 1 of the Terms of Service is bursting with statements that lack any real meaning such as "*people can only form communities on Facebook if they feel safe*" or "*stronger bonds create better communities*". Here, too, there is probably no will to commit to any legal consequences.

3.6.4.2. Determination (§ 869 ABGB)

A declaration is sufficiently specific if, on the one hand, the essential legal consequences it seeks to achieve can be inferred from it.

With many of the clauses (such as "*We provide you with a personalized experience*" or "*Our mission is to give people the opportunity to form communities and bring the world closer together*") it is not possible, even with the greatest imagination, to determine an exact consequence of the contract.

A "*personalized experience*" can mean many things and nothing, if it comes from a restaurant, a circus to a brothel. Likewise, from an airline to a social worker to a tunnel boring company, anyone can claim to "*bring the world closer together*" which shows that there is not any specific meaning of the claim.

The determination of the contractual content between the complainant and Facebook is therefore probably not to be derived from these clauses, but rather from the custom of the trade, the product actually offered ("social network") and all other possible interpretations under the ABGB.

3.6.4.3. Relevance of the clauses to the contract

The fact that the clauses in the Introduction, Parts 1 and 2, are not really relevant to the contract between the complainant and Facebook is also shown by the fact that they were added on 25. 5. 2018 and 31. 7. 2019 without the service or products of Facebook having changed. These are therefore at best "descriptions" (see point 2.1.1 above).

3.6.4.4. Intermediate result: No contract as defined in ABGB

In summary, the majority of the clauses in the introduction and parts 1 and 2 of the Terms of Service do not fulfil the requirements of a "contract" under the ABGB. There is therefore also no basis under Article 6(1)(b) of the GDPR.

In the overall context, the introduction and parts 1 and 2 of the Terms of Service are more likely to be viewed as a non-binding introduction, self-promotion and data protection information for the bona fide recipient of the declaration. Only parts 3 to 5 have the character of concrete, specific contractual clauses.

Due to the lack of findings of fact by the DPC or Facebook's submissions, it is impossible to discuss each individual clause in detail at this point, and we therefore reserve the right to make further submissions.

3.6.5. *In eventu*: Step 2 - Interpretation of the clauses

If, with regard to some elements or clauses of the introduction and parts 1 and 2, one comes to the (erroneous) conclusion that a contract exists, these elements would have to be interpreted accordingly in order to be able to define a contractual content and the necessity of any processing operations.

3.6.5.1. Contents of the respective clauses

It would go beyond the scope of this submission to interpret in a cumbersome manner every sentence of the Terms of Service. We therefore use the clause on advertising as an example of the impossibility of any meaningful interpretation under Austrian civil law:

> *"We will help you discover content, products and services that may be of interest to you: We will show you advertisements, offers, and other sponsored content to help you discover content, products, and services offered by the many companies and organizations that use Facebook and other Facebook products."*

What is unclear here is what the performance of the contracting parties is supposed to be? In order to show how absurd the idea of a civil law "contract" is in this area, we hereby briefly mention the theoretically possible contractual content:

Possibility 1: The user has a right to "help" to discover interesting products?

According to the objective wording of the Terms of Service, the user would be entitled to "*help*" to discover "*interesting content, products and services*". Facebook would thus have to suggest various contents according to the interests of the user and not the aims of the advertising customer.

The wording of the clause corresponds most closely to the role of an information broker in the interest of the user ("..*who on the basis of a private law agreement mediates business with a third party for a client*", definition of a broker in § 1 Austrian broker law, "MaklerG"). This literal application of the law is of course far from any reality.

Every time an advertisement is not "interesting", Facebook would consequently be in breach of the contract. The same applies if the advertisement was not aimed at "helping" the user, but to generate revenue from the advertiser. Facebook cannot reasonably be accused of wanting to have signed such a contract.

Equally completely unclear would be the amount or extent of this "obligation": How much advertising per day does Facebook have to deliver? 10 ads? 20? ...or is the service at the discretion of Facebook, which would make it "indeterminate" (§ 869 ABGB)?

Furthermore, according to § 1440 ABGB, the complainant could of course also "waive" such n obligation, which she has now done on a trial basis (see Annex G). Once an obligation is waived, data processing would once again no longer be "necessary" for the contract.

The reality, of course, looks completely different: Only the advertiser determines who gets to see his advertisement based on various parameters. Advertising for women's clothing can easily be shown to men and advertising for winter shoes can be shown in the desert. Facebook also admits this openly. In an introduction to the Terms of Service we read: "*[It] companies and organisations pay us to show you advertisements for their products and services*".

This first theoretical possibility must therefore be clearly excluded.

Option 2: Obligation of the user to view advertisements?

Another option would be that the user has an obligation to view the advertisement. This is already incompatible with in the wording of the clause.

However, here too the question of determination (§ 869 ABGB) would have to be clarified: How many hours a day does a user have to watch ads? ...or how many ads? What if a user doesn't look at the ads? For example, the complainant has installed an "AdBlocker" and therefore does not see many of the ads. Is she in breach of contract?

This second theoretical possibility must therefore also be clearly excluded.

Option 3: Mere tolerance of advertising by the user?

Finally, the AGB could theoretically still mean a kind of toleration ("Duldung") of advertising. There is no basis in the wording of the Terms of Service to suggest this either.

Much more fundamentally, however, this possibility fails on basic legal logic: One can only tolerate something in the legal manning ("Duldung") that interferes with one's own rights. A use of an apartment by the owner himself cannot be "tolerated" by a third party because the creditor and the debtor are identical and the third party has no entitlement to the object.

As described above (point 2.1.7) advertising on websites is a factual act. Facebook can already fill the entire page with advertising given the ownership of the website facebook.com. The mere placement of advertising does not in itself interfere with the rights of the complainant. Applied to an apartment this would be the tolerance to live in one's own apartment - which is legally impossible (see § 1445 ABGB).

Accordingly, contractual toleration must also be clearly excluded.

Summary

In summary, it can be seen that in any possible interpretation of this clause as "contract" within the meaning of ABGB is impossible. The wording is still most likely to be reconciled with an entitlement to "help" users - but this is contrary to daily practice.

While this interpretation is limited to advertisement, more contractual sense results from various other clauses in the introduction and in parts 1 and 2 of the Terms of Service.

3.6.5.2. Rule of ambiguity (Article 5 of Directive 93/13 and § 915 ABGB)

Furthermore, the ambiguity rule in Article 5 of Directive 93/13/EEC or in § 915 ABGB is to be used for interpretation:

> *"If there is any doubt as to the meaning of a term, the interpretation most favourable to the consumer shall apply."*

If a term is therefore to be understood as a contract or consent, the consumer can rely on the more favourable interpretation. Here this is clearly the consent, since it has significantly increased protection mechanisms and design options.

3.6.5.3. Hypothetical will of the parties (§ 914 ABGB)

The hypothetical will of the party may be considered by ways of a supplementary interpretation. That is what fair parties would have wanted if they had presented themselves with the now open question at the conclusion of the contract. This can be answered by the nature and purpose of the contract or other circumstances of the business.

Again, there is no evidence that the complainant and Facebook had agreed on a "contract" with the aim of personalising advertising, innovation or the transfer of data to third countries.

Nor is there any evidence that bona fide parties would see such declarations of intent in the introduction and in Parts 1 and 2 of the Terms of Service as a "contract" within the meaning of Article 6(1)(b). Once again, at the best (invalid) consent would have to be considered.

3.6.5.4. Custom (§ 914 ABGB)

The same result is also achieved by an interpretation according to custom:

We are not aware of any form of "contractual advertising". Neither outdoor advertising, advertising in means of transport, in classic media such as newspapers, TV or radio - nor advertising on websites are ever based on a contract or is a contractual service to the advertised. It is a de facto activity throughout (see also point 2.1.7 above).

For personalised online advertising, however, it is customary (and legally necessary) to give consent as defined in Article 4(11) for data processing.

An interpretation according to common customs therefore also leads to consent in accordance with Article 4(11).

3.6.5.5. True meaning (§ 914 ABGB)

In view of the lack of results in any other form of interpretation of these clauses, "*the intention of the parties is to explore*" (§ 914), which in view of the temporal, economic and factual context once again leads directly to a data protection consent as defined in Article 4(11) GDPR.

3.6.5.6. Hidden disagreement (§ 869 ABGB)

If even a (good faith) interpretation does not make sense of a clause, there is disagreement. A hidden disagreement exists if the parties are convinced that they have reached an agreement, although this is not the case because one and the other declaration were meant differently despite external agreement (see e.g. OGH in RS0014704).

If this exists in relation to a main point, no contract is concluded. Disagreement on an ancillary point leads to partial invalidity analogously to § 878 if this corresponds to the hypothetical will of the party.

Since, according to the submissions of the complainant and Facebook, there are different interpretations of the exchanged declarations of intent, a dissent in a secondary point would also have to be examined.

If this were the case, the clause in question would be null and void and thus data processing would not be "necessary" within the meaning of Article 6(1)(b) of the GDPR.

3.6.5.7. Intermediate result

In summary (if a contract exists at all), no meaningful interpretation of the introduction and parts 1 and 2 of the Terms of Service leads to a civil law claim. According to the rules of Austrian civil law in §§ 914 and 915 ABGB, some declarations are either null and void or (if at all) have to be interpreted again as (invalid) consent according to Article 4(11) GDPR.

Both routes also consistently lead to a lack of a legal basis under Article 6(1) GDPR.

3.6.6. *In eventu*: Step 3 - Invalidity of the clauses

If, however, one should come to the conclusion that a clause with claims to advertising, innovation or things like "bringing closer together" should have come about (quod non), the question arises whether such a contract or these clauses would be null and void:

3.6.6.1. Validity Check (§ 864a ABGB)

From the outset, it would have to be examined whether a clause became part of the contract at all, since in particular "*provisions of unusual content*" do not become part of the contract if the complainant did not have to reckon with it.

As stated in point 2.1.7 above, a “contract for advertising” or similar legal constructs is absolutely contrary to common practice and is therefore “unusual”. Similarly, as shown in point 2.1.4, Facebook has not made any reference to these provisions, but has even disseminated the information that there is no substantial change.

Clauses such as a "contract on advertising" or a "contract on research" are therefore probably the very definition of an unusual clause in the sense of § 864a ABGB and for lack of active information outside the Terms of Service impossibly valid under the Austrian civil law.

Exactly on the situation of content control in "hidden" advertising clauses, see, for example, *Schantz* in *Simitis/Hormung/Spicker*, Article 6, § 28.

Thus, various "data processing contracts" in the Terms of Service have already impossibly become contract components, because of § 864a ABGB

3.6.6.2. Permissibility (§ 879(1) ABGB)

Contracts which violate a legal prohibition are void according to ABGB. The GDPR prohibits in summary of Articles 4(11), 6(1)(a), 7 and 9 GDPR a "forced consent" as practiced by Facebook. § 879(1) ABGB covers all types of prohibitions (e.g. in criminal law, European law, constitutional law) and is therefore also applicable to prohibitions in the GDPR and is null and void.

3.6.6.3. Unconscious circumvention (§ 879(1) ABGB)

Even if Facebook did not know that this is certainly a circumvention (which can be ruled out in view of the clear intent), circumvention transactions are void according to § 879 ABGB even if a contractual partner had no intention of circumventing. For example *Kletečka/Schauer* in ABGB-ON, § 879, para 56:

> *"The problem of circumventing a legal prohibition arises if a contract in its concrete form does not contradict the prohibition, but nevertheless achieves largely the same success as the prohibited transaction. Typical examples are long-term rental agreements, which are concluded when the purchase of the property in question is not possible due to regulations under land law. According to today's hA, such a circumvention transaction is invalid if this is required by the prohibition purpose on which the prohibition standard is based. The intention of the contracting parties to circumvent the law does not matter: The dominant theory is the so-called objective theory, not the subjective theory."*

Therefore, nullity would also be the consequence.

3.6.6.4. Explicit prohibition under Article 7(2) GDPR

A "hiding" of consents in Terms of Service is also explicitly prohibited according to Article 7(2) GDPR and sanctioned with nullity of the clause. Since the introduction, parts 1 and 2 of the Terms of Service are neither understandable, nor in clear and simple language, nor clearly distinguishable from the other Terms of Service (Facebook even argues that the Terms of Service would be a uniform contract), this provision is clearly violated. Accordingly, these clauses are null and void.

If this were to apply only to "consents" but not to imposed "data processing contracts" in Terms of Service, there would also clearly be a gap in the law (“planwidrige Lücke”) that would be contrary to the system, which would have to be closed by analogy (“Lückenschluss”), if necessary, with recourse to Article 7(2) GDPR.

3.6.6.5. Gross Discrimination (§ 879(3) ABGB)

A contract is also null and void in the case of "*gross discrimination*" within the meaning of § 879(3) ABGB. The primary yardstick for assessing the extent to which there is gross discrimination is dispositive law as a "*model for a balanced and just reconciliation of interests*" (Kletečka/Schauer, ABGB-ON, § 879, Rn 279 ff).

For a legal basis for advertising, innovation or data transfer, the law in Article 6(1) of the GDPR provides for consent as a normal case, as does the use of special categories of data under Article 9 of the GDPR.

It is easy to see (and probably even the primary motive of Facebook) that a provision on Article 6(1)(b) GDPR massively undermines the rights of the complainant. A gross discrimination is not only given, but even the goal of Facebook. The clauses would therefore also be null and void under § 879(3) ABGB.

3.6.6.6. Transparency (§ 6(3) KSchG)

In implementation of Article 5 of Directive 93/13/EEC, § 6(3) KSchG requires the transparency of Terms of Service in consumer contracts in addition to the certainty in § 869 ABGB. Provisions that are unclear to the average consumer are therefore invalid - and no basis for data processing under Article 6(1)(b) GDPR.

Generally not transparent

It is probably difficult to deny that learned lawyers cannot ascribe any true meaning many of the clauses in the introduction and in Parts 1 and 2 of the Terms of Service (see above, for example, the attempt to assign the "advertising clause" to civil law under points 3.5.5.1). Nor do the Terms of Service themselves provide any information to the effect that these clauses are intended to provide a legal basis for data processing pursuant to Article 6(1)(b) GDPR.

Even the information in the "Legal Basis" document itself is not transparent, as it has been hidden in a sub-sub-page and the content of it is not legally comprehensible (see above point 2.1.1).

More Specific: Switch of legal basis not transparent

But also the switch to new Terms of Service and any change therein (see the "User Engagement Flow" above under point 2.1.4) must be "transparent". Facebook has listed a few points here, but the fundamental switch from Article 6(1)(a) to (b) under data protection law was concealed. This also violates § 6(3) KSchG.

3.6.6.7. Summary: Clauses probably regularly null and void

In a hypothetical test, all identifiable clauses would be regularly null and void. Not only because a circumvention also leads to nullity under the ABGB, but also because other legal grounds for nullity would apply.

Facebook would have to state on each clause why it is not null and void or the DPC would have to consider this as a preliminary question to a "necessity" under Article 6(1)(b).

3.6.7. *In eventu*: Step 4 - Voidability of clauses

Finally, (assuming that any clause would be a contract) there would still be various grounds for contesting or for removing the legal basis in civil law, such as:

3.6.7.1. *Laesio Enormis* (§ 934 ABGB)

According to § 934 ABGB, a contract is to be cancelled if the value of the service falls below 50% compared to the payment. Since Facebook does not provide any services other than the platform, but the users provide content and make advertising revenues possible through generated traffic, in the light of Facebook's business figures the question arises as to whether or not the value of the product is not undercut by more than half (*laesio enormis*) (see point 2.1.3 above).

Following a challenge to the contract, the legal basis under Article 6(1)(b) GDPR would also cease to apply.

3.6.7.2. Waiver (§ 1440 ABGB)

The complainant has submitted a waiver of various "services" to Facebook (see Annex G). Even if there has ever been a contractual performance here (which is denied), this contractual obligation by Facebook is extinguished with the waiver of the obligation.

3.6.7.3. Error (§ 871 ABGB)

Furthermore, a nullity of the contract due to an error on the part of the complainant would have to be examined. Facebook has obviously (see points 2.1.1 and 2.1.4 above) caused an error in the complainant's legal nature of the declaration (§ 871(1), 1st case), in particular because of the duty to provide information under Articles 13 and 14 GDPR in conjunction with § 871(2) ABGB.

Following a challenge to the contract, the data protection basis under Article 6(1)(b) GDPR would also cease to apply.

3.6.8. Summary: To exclude valid "contract" regularly

In summary, a hypothetical consideration of the relevant clauses in the introduction and the 1st and 2nd part of the Terms of Service does not normally lead to a valid contract.

Even if individual clauses were to constitute a contract (which seems mostly excluded), Facebook would have to explain how they would meet the requirements of e.g. §§ 869, 871, 879, 914 and 915 ABGB or § 6 KSchG.

In the event that Facebook makes a concrete statement to this effect or the authorities provide a concrete investigation result, we reserve the right to reply accordingly.

3.7. On the five consents in the "User Engagement Flow

Irrespective of the treatment of the introduction and parts 1 and 2 of the Terms of Service, the following consents are also invalid:

3.7.1. Processing of special categories of data

As stated under point 2.1.5.1, Facebook processes a large number of special data categories as defined in Article 9 GDPR, far beyond those stored in the "General Information" part of the profile. Above all, other people also share sensitive data (such as health data) and Facebook allows targeting for their own purposes based on specific data categories (such as a political interest).

As Article 6(1) in conjunction with Article 9 GDPR does not provide for a legal basis for this processing, Facebook appears to process the special data categories without a legal basis and therefore there are to be prohibited.

3.7.2. Processing of biometric data

As mentioned under point 2.1.5.2, it is technically impossible to process only the biometric data of users who have agreed to facial recognition.

Since no other legal basis is possible under Article 6 in conjunction with Article 9 GDPR, Facebook appears to create and process the biometric data in uploaded photos without a legal basis. Facebook ever even know whether consent has been given, once a "match" occurred. Facebook therefore proceeds under a "*processing by default*" basis, only in order to be able to subsequently assign consent in a few cases.

Valid consent is not given even in these situations, however, because the concrete context is highly relevant, especially for photos (for example, a nude photo from a holiday has other implications than a job application photo). A blanket consent for "matching" with any photo uploaded by any of over 2 billion Facebook users seems neither informed nor specific enough to comply with Article 6(1)(a).

What is particularly strange is that the Irish DPC has already banned this type of data processing by Facebook in 2012 - apparently without long-term success.

It is therefore disputed that Facebook has a legal basis for this processing. Accordingly, the processing of biometric data must also be prohibited prior to "matching".

3.7.3. Processing of data from external advertising partners

As described in Section 2.1.5.3, Facebook receives data from advertising partners without consent. Facebook has made no claim that the transmission and other processing of data by advertisers themselves is based on a legal basis under Article 6(1). Only the "use" of this data for advertising on Facebook should be based on consent.

It is therefore disputed that Facebook has a legal basis for the transmission and processing of the data.

3.7.4. Disclosure of data to advertisers

We reserve any submissions on this point, once the relevant evidence was obtained (see above Point 2.1.5.3).

3.7.5. Consent through device settings

As stated above under point 2.1.5.5, the access system of Android or iOS only requests access for an entire smartphone application, not the specific purpose or other information necessary for a specific and informed consent.

Even the privacy policy cannot help here, because Facebook uses the principle of a "*mixed basked privacy policy*" and only says all data of all users for all extremely generic purposes and for all current to future data applications will be used.

An example of this is the use of the "microphone" for the Facebook messenger: here the user allows the recording of messages - but was probably not aware that Facebook had these data evaluated by employees - as recently became known (https://www.dw.com/de/auch-facebook-lie%C3%9F-audio-chats-abtippen/a-50015895).

It is therefore disputed that this is an informed and specific consent.

3.8. *In eventu*: Processing violates Article 5(1) GDPR

The complaint deals with the transparency of the legal bases as a preliminary question to Article 6(1) DSGVO, while the Draft Report treats this as an independent issue.

As already explained above (see points 3.4. to 3.6.), it is not stringent to assume informed consent (or *in eventu* a valid civil-law declaration) if at the same time the transparency requirements of Articles 5(1) in conjunction with Articles 12 and 13 of the GDPR are not to be fulfilled.

Of course, the lack of information which, in the complainant's view, already leads to the abolition of the legal basis under Article 6(1) GDPR also leads to a violation of Article 5(1)(a) GDPR.

In any event, in order to establish consistency between the scope of the complaint and the Draft Report, an application under Article 5(1)(a) GDPR is submitted *in eventu* (see point 4.2.2 below).

4. Applications

4.1. Procedural applications

We hereby refer again to the application under point 1.6. of the original complaint and those in the letter of 20. 8. 2019, which have not yet been dealt with.

Furthermore, we make the following applications:

(i.) To determine of the concrete clauses in the Terms of Service on which Facebook bases concrete data processing operations for concrete purposes (see points 2.1.1 and 2..2.3),
(ii.) to request Facebook to demonstrate the economic necessity of processing for data-driven advertising (see point 2.1.3) if Facebook should further rely on this argument,
(iii.) to determine the legal basis for setting cookies (see point 2.2.2 above),
(iv.) to determine the intent ("subjektive Tatseite") of Facebook for changing the legal basis; and
(v.) to base the decision on the Terms of Service of 31. 7. 2019 and
(vi.) to make make all files, submissions and other documents available.

Furthermore, we apply that any official of the Irish Authority who is subject to the rules against bias (§ 7 AVG) be excluded from the proceedings (see point 1.8 above).

4.2. Material applications

The request under point 3.3 of the original complaint remains valid. In addition the following applications are made:

4.2.1. *in eventu*: Lack of legal basis under Article 6 GDPR

In view of the surprising reasoning of Facebook, the complainant, in addition to the applications under point 3.3 of the orignal complaint, *in eventu* requests that the data protection authority (or the lead supervisory authority), in accordance with its powers under Article 58(1)(d), (f) and (g) in conjunction with Article 17 of the GDPR (or any other legal basis), prohibit the following processing operations for lack of any legal basis under Article 6(1) of the GDPR:

(i.) Processing for personalized advertising (in particular according to the introduction, 2nd paragraph; part 1, 4th point and part 2 of the Terms of Use)
(ii.) Processing for research purposes in order to develop, test and improve our products and to develop "advanced technologies" (in particular according to Part 1, 6 and 7 of the Terms of Use).
(iii.) Data exchange across different platforms (in particular according to Part 1, 8. point of the terms of use)
(iv.) Storage and distribution of data "*in computer centres and systems all over the world*" (in particular according to Part 1, 9th point of the Terms of Use)
(v.) The processing of special categories of data (within the meaning of Article 9 GDPR) outside the self entered data in the "General Information" part of the profile
(vi.) Processing of biometric data (as defined in Article 9 GDPR)
(vii.) The processing of data from external advertising partners
(viii.) The use of device data beyond the concrete reason for the activation of access rights
(ix.) The processing of cookie data (as defined in Article 5 of Directive 2002/58/EC)

4.2.2. *in the alternative*: infringement of Article 5(1) GDPR

In view of Facebook's surprising submission, the complainant, *in eventu* to the application under point 3.3 of the original complaint, also moved that the data processing operations referred to in Section 4.2.1 should also be prohibited on the grounds of a violation of Article 5(1) of the GDPR.

We expressly reserve the right to adapt this request on the basis of the investigation results (in particular which concrete processing steps of which data for which purposes are carried out on the basis of which concrete legal basis).

Attachments:

A) Statement at the LGfZRS (Civil Court) Vienna: Change from Consent to Contract on 25. 5. 2018
B) Facebook Newsroom Posting from 5. 4. 2018
C) Facebook Newsroom Posting from 17. 4. 2018
D) "Legal Basis" document in the current formatting
E) Terms of Service applicable from 31. 7. 2019
F) Affidavit Dr. Lisa Ballmann
G) Waiver under § 1440 ABGB