

## Overview over Cooperation between Irish DPC and Facebook

### Meetings between DPC and Facebook (Nov 2017 to May 2018)

Between November 2017 and May 2018 the DPC and Facebook held ten meetings to discuss Facebook's approach to the GDPR. The content of the meetings are not disclosed by the DPC, despite Facebook relying on these meetings in ongoing litigation. The DPC later claimed that these meetings were not binding on the DPC and that the public and data subjects whose data is processed based on the agreements reached in these meetings have no right to know the contents of the meetings. In general, Facebook relies on these meetings in litigation, while the DPC later played down the significance of these meetings.

In [submissions to the DPC from 27. September 2018](#), Facebook described the meetings with the DPC ["the Commission"] as follows:

*"We have drafted this response against the background of our detailed direct engagement with the Commission prior to the implementation of the recent update to our terms, spanning 10 meetings, which covered many of the issues responded to herein. Facebook Ireland has not materially changed its compliance approach since these meetings."*

In litigation before the Austrian Courts from 20. November 2018 Facebook describes the meetings with the Irish DPC ["IDPC"] as:

*"The defendant has developed this legal framework after extensive consultation with the IDPC, which included several face-to-face meetings between November 2017 and July 2018."*

### GDPR becomes applicable on 25. May 2018

Facebook switches from "consent" to "contract" at midnight, when the GDPR became applicable. This approach is further called the "consent bypass".

### Complaints by noyb on 25. May 2018

On 25. May 2018 noyb files complaints on "forced consent" against Facebook, Instagram and WhatsApp (Annex C). The case will last for more than three years. In 2019 it will become clear that Facebook relies on a "broad" interpretation of Article 6(1)(b) GDPR, citing the ten meetings with the DPC in its submissions.

- The Complaint is available here: <https://noyb.eu/sites/default/files/2020-05/complaint-facebook.pdf>

## The Irish DPC's role in the EDPB Guidelines on Article 6(1)(b) and the "consent bypass" (2018 to October 2019)

- The following documents were obtained via a Freedom of Information Request at the EDPB. The individual DPAs were redacted, but it is assumed that the DPC was first leading the drafting process (together with two co-rapporteurs) and was replaced by another DPA.
- The DPC pushed a novel approach to "necessity" for a contract – basically saying that there needs to be abroad interpretation of Article 6(1)(b) GDPR, where "*necessary for the performance of a contract*" is not "*strictly necessary*" but more connected or useful for a contract. Other DPAs pushed back heavily.
- Interestingly the DPC pushed exactly for "social networks" to be allowed to use terms and conditions instead of consent for adverting and suggested various examples that include "social networks", which seems to be 1:1 the approach agreed with Facebook in the 2017/2018 meetings.
- There seems to be a major conflict of interest the regulator is not only working on general guidelines on the EDPB level, but specifically tries to ensure that the business model of one regulated entity (Facebook, the main "social network") that is has a case on will be legitimized via EDPB guidelines.

EDPB Doc	Content Summary	Date	Author	To do
Document 1	DPC outlines two "options" and suggest an „alternative“ to the core functions interpretation.	24-10-2018	99% DPC (Irish notation, Calibri font, etc).	Clarify if the DPC's.
Document 2	<p>Draft Guidelines by the DPC, Responses (AxxRxx) are by the DPC, as apparrent from context and A89R88, which was not redacted and says "<i>The Irish DPC is concerned...</i>"</p> <p><b>Codes:</b>  <u>A01, A02...</u> = Annotation 01, 02...  <u>A03R02</u> = Annotation 03 in Response to Annotation 02 (<i>sometimes response is above the annotation</i>)</p> <p><b>On Social Networks and Ads specifically:</b></p> <ul style="list-style-type: none"> <li>• DPC added <b>Example 1, 2 and 3</b> all on "social networks" using data for advertisement under terms and conditions (exactly what Facebook does).</li> <li>• In <b>Example 1</b> the DPC already suggests that <b>Social Media</b> may not use Article 6(1)(b) for profiling of users it does not even have a contract with (indicating that it would be possible for others).</li> <li>• <u>A45</u> a DPA refuses to even engage with tracked changes on the new paper and the Social Media Example 1: "<i>We note that the examples in this version have changed completely. We will not comment with track changes at this stage, as the general direction and scope of the paper should be agreed on first.</i>"</li> <li>• <u>A47</u>: Already notes that "<i>the company cannot legitimately rely on article 6(1)(b) for the building of a profile, in particular if this provide is meant to be used for targeted advertisement.</i>"</li> </ul>	16-10-2018	<p>DPC (in charge at the time, likely circulated together with Document 1).</p> <p>See Annotation</p>	

	<ul style="list-style-type: none"> <li>• In <b>§ 24 of the Draft</b>, the DPC suggests that adding <b>advertisement</b> to a contract (as Facebook did) would allow the processing to fall under Article 6(1)(b). This was responded to by six negative comments of other DPAs (A88 to A94).</li> <li>• <u>A90</u>: “Disagree. <b>This reduces the GDPR to a pro forma instrument.</b> As long as you remember to include all kinds of requirements and provisions in a contract (...) controllers can do as they like and there is no need for consent or a balancing of interests. (...) <b>Is it possible to provide social media accounts without tracking and profiling? Yes, in fact it is.</b>”</li> <li>• <u>DPC</u> in response to A90 in A91R90: “the strict approach (as developed to date) is not clearly supported in law” [clarifying that the DPC wants to depart from it].</li> <li>• <u>A92</u>: “We suggest <b>deleting this paragraph</b> (...) The terms not only need to indicate that behavioral tracking (..) will take place, but these processing must be a necessary element of the contract.”</li> <li>• In <b>Example 2</b> the DPC suggests that “Social Networks” (like Facebook) can use terms to bypass consent, but must be somewhat transparent about it. This is again rejected by other DPAs in A95 and 96: <ul style="list-style-type: none"> <li>• <u>A95</u>: “Those [transparency] principles (...) cannot make up for the <b>lack of lawfulness.</b>”</li> <li>• <u>A96</u>: “We don’t agree with this example. Does this mean that ‘monitoring of their behavior’ can be based on the contract? How to deal with the right to object? In addition this consent would not even be valid, insofar as it must clearly state that the monitoring of their behavior will take place for personalized advertisement.” The other DPA further notes the DPC’s focus on legalizing social networks: “<b>Furthermore, all the examples seem to relate to social networks</b>”.</li> </ul> </li> <li>• In <b>Example 3</b> the DPC again tries to legalize Social Media using the terms for data processing.</li> <li>• <u>A103</u>: “<b>Contrary to everything we believe in (sorry, but it’s true), as well as previous A29WP guidance. Is it possible to provide social media accounts without tracking and profiling? Yes, in fact it is. Therefore, tracking or profiling is not necessary for the performance of that contract.</b>”</li> <li>• <u>A105</u>: Another DPAs started highlighting that DPC is constantly referring to social media as an example: “We suggest removing this example, as this <b>refers again to social media.</b> In addition, the monitoring of user behavior cannot be held as reasonably necessary to perform the contract. This has never been the interpretation of Article 29 working party and it cannot be one of the EDPB.”</li> <li>• In <b>§ 48 to 52 of the Draft</b> the DPC seems to try to delete the whole section that says that advertisement is not “necessary for the contract”.</li> <li>• <u>A130</u>: “We don’t agree with the deletion of these paragraphs. This is the heart of our paper, the fact that online behavioural advertising is not necessary for the performance of a contract.”</li> </ul>			
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	<p><b>Other Highlights:</b></p> <ul style="list-style-type: none"> <li>• <b>A8 &amp; A9:</b> Two comments asking why the CJEU case law on “necessity” is omitted (by other DPAs).</li> <li>• <b>A10:</b> “this paragraph goes a long way to in suggesting that the freedom to conduct a business is a higher-ranking norm than the right to privacy...”</li> <li>• <b>A17 and Response in A18R17:</b> DPC clarifies that it removed everything that “implies a strict necessity approach”.</li> <li>• <b>A28:</b> “This section contradicts earlier advice and guidance of WP29. (e.g. Opinion 06/2014). Therefore, we refer to our second comment to this draft: this version of the text may be a dead end.”</li> <li>• <b>A30:</b> “We have an issue with the fact that the following sections clearly contradicts previous A29WP guidance on the matter. There is no reference to Opinion 06/2014, which notably states ‘The provision must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract, but rather unilaterally imposed on the data subject by the controller...’”</li> <li>• <b>A50 on “necessity”:</b> “We note that 90% of our work on analysing this concept in the previous version has been deleted, including relevant ECJ case law”</li> <li>• <b>A65:</b> “A contract cannot legitimately try to undermine or circumvent an EU regulation, its wording, spirit or system. (...) The approach suggested will circumvent other legal bases. If anything could be freely specified in a contract, controllers would not need to collect consent nor perform balancing tests. (...)”</li> <li>• <b>A67:</b> “In this concept the most important element of Article 6(1)(b) necessity has been totally undermined.”</li> <li>• <b>A70:</b> “This seems to accept monetization of personal data (...) We think that this interpretation undermines the system and spirit of the GDPR.”</li> </ul>			
Document 3	New Draft, seems to be from another DPA with a different approach than Document 2. <i>Detailed analysis is to be done.</i>	No date	Unknown Author	
Document 4	Memo of EDPB Plenary Meeting. Clarifying that there was a lead rapporteur and two co-rapporteurs and mentioning a change of the rapporteur team as well as the current general approach.	22-01-2019	EDPB	
Document 5	E-Mail by a DPA to the others.	22-03-2019	Unknown Author	
Document 6	New Draft, seems to be from another DPA with a different approach than Document 2. <i>Detailed analysis is to be done.</i>	08-02-2019	Unknown Author	
Document 7	New Draft, seems to be from another DPA with a different approach than Document 2. <i>Detailed analysis is to be done</i>	15-03-2019	Unknown Author	
Document 8	New Draft, seems to be from another DPA with a different approach than Document 2. <i>Detailed analysis is to be done</i>	No date	Unknown Author	

Document 9	<i>New Draft, seems to be from another DPA with a different approach than Document 2. Detailed analysis is to be done</i>	No date	Unknown Author	
Doc. 10	<i>New Draft, seems to be from another DPA with a different approach than Document 2. Detailed analysis is to be done</i>	No date	Unknown Author	
Doc. 11	<i>New Draft, seems to be from another DPA with a different approach than Document 2. Detailed analysis is to be done</i>	No date	Unknown Author	

### Final EDPB Guidelines on 8 October 2019

The final guidelines do not refer to social media and take a stricter approach on “necessity” than the DPC suggested. In the end, some elements of the Guidelines seem to also be a compromise: [https://edpb.europa.eu/sites/default/files/files/file1/edpb\\_guidelines-art\\_6-1-b-adopted\\_after\\_public\\_consultation\\_en.pdf](https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines-art_6-1-b-adopted_after_public_consultation_en.pdf)

### Draft Decision by DPC on 6 October 2021

On 6 October 2021 the DPC issues a draft decision, where it follows a “broad” interpretation of necessity and finds that Facebook may use the terms and conditions under Article 6(1)(b) instead of consent under Article 6(1)(a) GDPR – in contrast with the EDPB Guidelines. In the “Schedule” to the Draft Decision the DPC denies any allegation of bias. These documents are available here:

- Draft Decision: <https://noyb.eu/sites/default/files/2021-10/IN%2018-5-5%20Draft%20Decision%20of%20the%20IE%20SA.pdf>
- Schedule: <https://noyb.eu/sites/default/files/2021-10/IN%2018-5-5-%20Schedule%20to%20Draft%20Decision%20of%20the%20IE%20SA.pdf>