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To the:
European Data Protection Board
Rue Wiertz 60
1047 Brussels
BELGIUM

Vienna, 17.1.2023

Subject: The Irish DPC's Breach of Obligations under the EDPB Decision on Meta IE

Dear Ms Jelinek,
Dear Members of the EDPB,

We are currently analysing the EDPB Decisions on Meta IE's Facebook and Instagram services.

While we have a number of concerns, that we have already raised with the relevant CSAs and the LSA and may need to raise with the EDPB in a separate exchange, we would like to bring the following element of the final decision by the Irish DPC to the attention of the EDPB:

- **The EDPB's requirement to determine unlawful financial benefits of Meta**

The EDPB Guidelines on calculation of fines, as well as paragraph 370 to 377 of the Facebook decision, clarify that a fine should aim at “*counterbalancing the gains from the infringement*” and that the Irish DPC should “*impose a fine that exceeds that amount*”. Specifically in relation to the violation of Article 6(1) GDPR, the EDPB repeats the same elements in paragraph 466 to 469 and explicitly held:

“469. Nonetheless, the EDPB acknowledges the need to prevent that the fines have little to no effect if they are disproportionately low compared to the benefits obtained with the infringement. The EDPB considers that the IE SA should ascertain if an estimation of the financial benefit from the infringement is possible in this case. Insofar as this results in the need to increase the amount of the fine proposed, the EDPB requests the IE SA to increase the amount of the fine proposed.”

In order to comply with the LSA's obligation under Article 83(1) GDPR to issue an “*effective, proportionate and dissuasive*” fine and the duty to take financial benefits into account under Article 83(2)(k) GDPR, it is imperative to skim off all revenue that a controller has made when violating the GDPR. Otherwise, infringements of the GDPR would clearly “pay off”, which would be the antithesis of an “*effective, proportionate and dissuasive*” fine.

The EDPB decision makes it clear, that the Irish DPC must estimate the revenue of Meta IE and must also adjust the fine to ideally exceed the revenue made by Meta IE when violating the GDPR.

- **Lack of implementation of the requirement in the Irish DPC's decision**

In reaction to the EDPB's orders to investigate and adjust the fine, the Irish DPC's decision simply states that the DPC does not know how to estimate the unlawful revenue of Meta IE and the EDPB did not give specific instructions on the matter. The DPC is therefore simply not complying with these orders:

"9.114 Despite specific requests made by the Commission, during the course of the Article 65 deliberations, no directions have been provided by the EDPB, in its Article 65 Decision, as to the manner in which the Commission might seek to ascertain an estimation of: (i) the financial benefit gained from an infringement such as the one under assessment; or (ii) the competitive advantage derived from the infringement."

"9.115 In the absence of directions, the Commission is unable to ascertain an estimation of the matters identified above. Accordingly, I am unable to take these matters into account for the purpose of this assessment."

- **No use of powers under Article 58(1) GDPR**

noyb is rather surprised that the Irish DPC would be unable to take the financial benefit of Meta IE into account, given that Articles 58(1)(a) allow the DPC to order Meta IE *"to provide any information it requires for the performance of its tasks"*, while Article 58(1)(e) allows the DPC to *"obtain ... access to ... all information necessary for the performance of its tasks"*.

It is clear that any company with a sound financial governance must have the methodology and the staff to evaluate how their revenue is generated and would have relevant documentation. Meta is notorious for optimizing advertisement based on revenue and is without a doubt able to provide detailed numbers in relation to the revenue made by (unlawfully) processing personal data for the purposes of *"behavioural advertisement"*.

In its decision, the DPC has not even considered using its statutory powers under Article 58(1) GDPR to investigate the matter, as required by the EDPB decision.

- **Focus on revenue when violating Article 6(1) GDPR**

While the Irish DPC may be correct that the unlawful revenue due to the violation of the transparency obligations are hard to estimate¹ – especially when considering the limited time of one month² – we want to note that the DPC did not even try to use its powers under Article 58(1) to determine these facts.

However, the unlawful revenue from violating Article 6(1) GDPR seem to be easy to estimate, as Meta IE itself publishes the revenue made from advertisement on a quarterly basis per region.

The rest of this letter therefore focuses only on the unlawful revenue when violating Article 6(1) GDPR (see paragraphs 466 to 469 and 473 of the EDPB decision) and ignores possible additional revenue from a violation of the transparency obligations (see paragraphs 370 to 377 of the EDPB decision), for the benefit of Meta IE.

¹ This would indeed require a study as to how many users would have quitted Facebook or Instagram or used the services less, when knowing how Meta IE tried to bypass Article 6(1) GDPR.

² In fact the DPC decision issued on 31 December 2022, while it had at least until 5 January 2023 to issue the decision, which would have allowed to do a simply online search or request final information from Meta IE.

- **Meta IE’s unlawful revenue far exceed the maximum GDPR fine of 4%**

Even if the Irish DPC is (for whatever reason) unable to use its statutory powers under the GDPR, it is painfully obvious that a simple calculation shows that Meta IE profited from the violation of Article 6(1) GDPR far beyond the maximum fine of 4%. This is because of the following factors:

- Given that the violation has been ongoing for more than 4.5 years (as the procedure was substantially delayed by the DPC) the unlawful turnover is based on a reference period which significantly exceeds the one year period on the basis of which the maximum fine is calculated.
- In addition, Meta IE has an extremely high percentage of turnover from (now largely unlawful) advertisement. Indeed, almost all turnover in the EEA comes from advertisement.
- This means that determining the exact revenue that Meta IE has made from violating Article 6(1) GDPR since 25 May 2018 is actually not relevant for imposing a fine, as it far exceeds the maximum fine under Article 83(5) GDPR in any realistic scenario. As demonstrated below the DPC therefore only had to show that in any realistic scenario, the revenue from violating Article 6(1) overshoot the maximum fine of 4% multiple times, to set the fine at exactly the maximum of 4%.

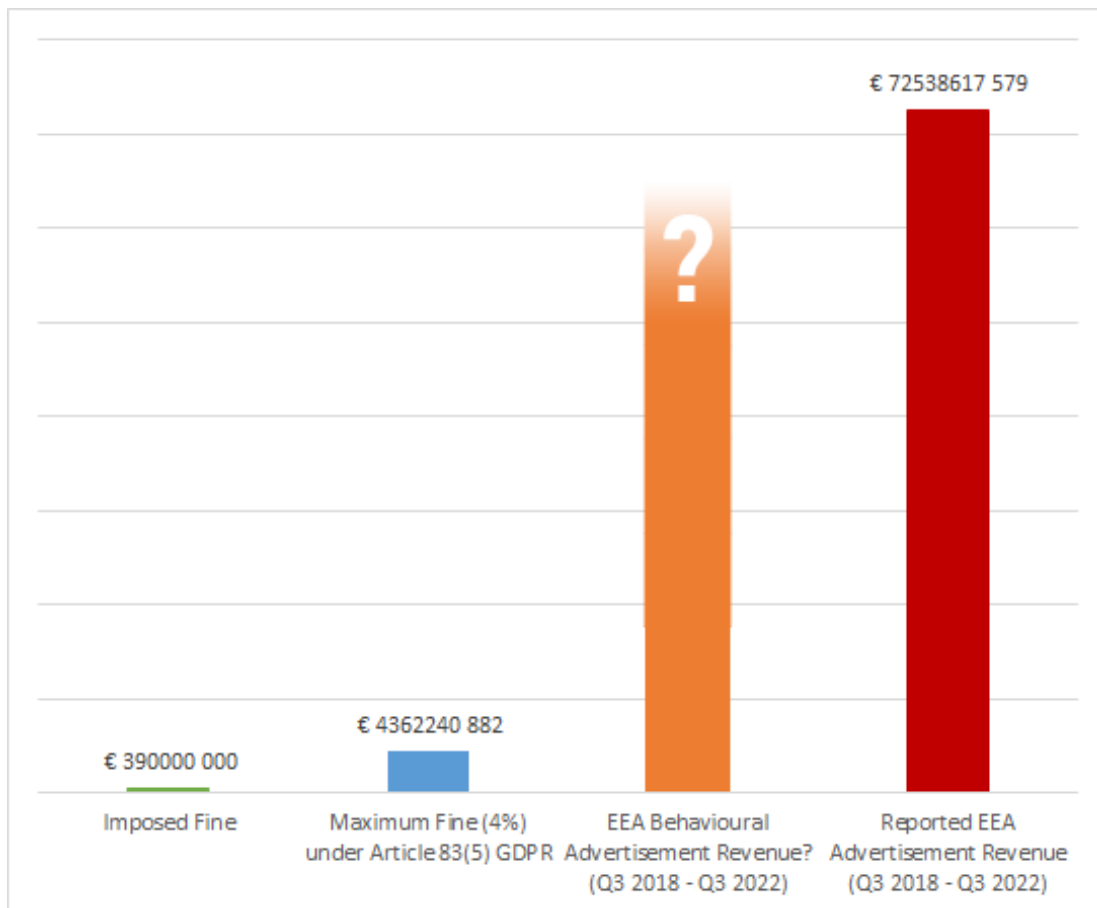


Chart: Imposed Fine, Maximum Fine, Behavioural Ads Revenue and Reported Ads Revenue

Given this situation, the Irish DPC was not only clearly able to comply with its obligations under the EDPB decision, but it would have had to impose a 4% fine, as the DPC was clearly bound to (1) estimate the revenue generated from a violation of the GDPR, (2) impose a fine that reflects the unlawful revenue made by Meta IE and that (3) does not exceed the legal limitations of 4% under Article 83(5) GDPR.

- **Meta IE's unlawful revenue far exceeds the maximum GDPR fine of 4%**

Even without the use of the DPC's powers under Article 58(1) GDPR, but with the mere power of search engines and mathematics, it is easy to calculate that Meta's revenue from violating Article 6(1) GDPR far exceed the maximum fine of 4% under Article 83(5) GDPR:

Preliminary assumptions

Meta is partly opaque about details of revenue streams and public filings only provide limited information. We therefore assumed the following (all of which is beneficial for Meta IE):

- We assumed that the various violations identified in the EDPB decision and the DPC decision are to be seen as a single violation with a single maximum penalty of 4%, even if they concern two different products and the violation of Articles 5(1)(a), 6(1), 12(1), 13(1)(c) and 14 GDPR, which could be seen as multiple violations, allowing for multiple penalties of 4%. Indeed even the DPC seems to issue three fines for Facebook and three fines for Instagram services, indicating that it understands the two cases to concern six violations overall, under Article 83(5) GDPR.
- We assumed that EEA and non-EEA users generate the same revenue for Meta, even if the GDP per capita in the EEA is higher than the GDP per capita on the entire European continent.³
- We further ignored the revenue generated from Advertisement in the EEA between 25.5.2018 and the start of Q3 2018, as well as the revenue generated since the end of Q3 2022, as Meta does not provide details on these numbers.

We further assumed the following (without knowing if this benefits Meta IE or not):

- We assumed that the percentage of EEA Instagram users is equal to the percentage of EEA Facebook users (on average 85,52% in the relevant period). This assumption was necessary as Meta only publishes user numbers of Facebook per geographic region, but not the numbers of Instagram.
- We assumed the exchange rate between US-Dollar and Euro is 0,94476, as of writing of this letter, which may be subject to slight fluctuations.

We further assumed the following, which could be contrary to the interests of Meta IE:

- In December 2020 Meta IE has announced their intention to shift UK users to Meta USA some time in 2021.⁴ It is unclear if or when this came into effect. At least the numbers reported to the EDPB of Q3 2021 do not show a drop of users assigned to Meta IE. As it is unclear if this announces shift ever happened, this factor is not included in our calculation. Given the UK GDP of about 15,2% of the EEA's (number from 2017)⁵ even an shift of UK users from Meta IE to Meta USA from Q4 2021 onwards would only amount to roughly € 3,175 billion in less revenue under the control of Meta IE. This factor is easily offset with the missing revenue for Q4 2022 and the rest of Q1 2023 and all other factors that benefit Meta IE listed above.

Given that the majority of these assumptions benefit Meta IE and given the fact that the overshoot of revenue from advertisement versus the maximum fine is about 16-fold, these assumptions do not seem to play any role when calculating the maximum fine in this case.

³ See <https://www.imf.org/external/datamapper/NGDPDPC@WEQ/OEMDC/ADVEC/WEOWORLD> (Europe GDP per capita of US\$ 34,510 versus EU GDP per capita of US\$ 38,100)

⁴ <https://www.bbc.com/news/business-55328376>

⁵ <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180511-1>

(1) First Starting Point: The maximum fine of 4% under Article 83(5) GDPR

Based on Meta IE's annual turnover of € 109,056 billion (\$ 117,929 billion⁶) in 2021, the maximum fine in this case is € 4,362 billion (4% of the worldwide annual turnover).

This means that even if the unlawful revenue of Meta IE from the violation of Article 6(1) GDPR between 25.4.2018 and the date of the decision exceeds far beyond the maximum fine, the fine is capped at € 4,362 billion.

(2) Second Starting Point: Revenue of Meta in Europe between 25 May 2018 and today

The financial reports of Meta show a revenue made within geographic Europe between Q3 2018 and Q3 2022 of € 84,70 billion (\$ 91,59 billion).⁷

(3) Adjustment for EEA is about 85,52% of the European revenue

Meta IE does not publish revenue numbers of the European Economic Area (EEA), but only for geographic Europe. The numbers must therefore be adjusted to only reflect EEA revenue, which would be directly based on the violation of Article 6(1) GDPR.

According to the user numbers contained in paragraph 297 of the EDPB decision, it is easy to calculate that between Q3 2018 and Q3 2022 about 85,52% of all Facebook users in Europe fell under the controllership of Meta IE.

The EDPB decision contained user numbers for the EEA for Q3 2018 and Q3 2021, which can be directly compared to the reported numbers of Meta for geographic Europe. In Q3 2018 about 84,5% of all European users were in fact EEA users. In Q3 2021 this number rose to 86,0%.

The quarters between Q4 2018 and Q2 2021 can be based on a linear average between the two known quarters, which would mean a linear increase of 0,14% per quarter.

For the remaining quarters of Q4 2021 to Q3 2022, we assumed a stagnation in growth of the EEA user ratio and used the number for Q3 2021.

Once the European revenue is adjusted to only reflect EEA users, Meta IE must have made about € 72,53 billion (\$ 78.44 billion) in advertisement revenue in the EEA in the relevant period.

(4) Distinction between revenue from "advertisement" and "behavioural advertisement"

Meta still provides advertisement that is not behavioural, such as contextual advertisement. This leads to the only major unknown, as the amount of revenue that Meta IE is making for different types of advertisement is not published and the decision seems to only concern "behavioural advertisement".

Meta itself claims that behavioural advertisement would be the core of their business model,⁸ it is therefore likely that the majority of all revenue comes from behavioural advertisement that is based on the processing of personal data without a legal basis under Article 6(1) GDPR.

⁶ See paragraph 10.42 of the DPC decision.

⁷ Based on quarterly earnings reports of Meta from Q3 2018 (the quarter following 25 May 2018) through Q3 2022 at <https://investor.fb.com/financials/?section=quarterlyearnings>

⁸ See e.g. paragraph 90 of the EDPB decision on Facebook.

However, an argument to the extreme makes clear that for the purposes of determining an “*effective, proportionate and dissuasive*” fine it is irrelevant if 90%, 50% or only 30% of Meta’s advertisement revenue comes from behavioural advertisement or not. Once the maximum fine of 4% (€ 4,36 billion) is taken into account, even if only 6,01% of Meta’s IE revenue stemmed from behavioural advertisement, the maximum GDPR fine of 4% would be reached.

It is absolutely unrealistic that behavioural advertisement would account for less than 6,01% of all revenue by Meta IE. Consequently the Irish DPC would have to apply the maximum fine of 4% to even remotely comply with the requirements of the EDPB decision and Articles 83(1) and 83(2)(k) GDPR.

➔ This means that unless Meta IE is not even generating 6,01% of all advertisement revenue from behaviour advertisement, the Irish DPC was bound by Articles 83(1) and 83(2)(k) GDPR and the EDPB decision to impose the maximum fine of 4% on Meta IE.

- **Meta IE would still generate unlawful revenue of up to € 68,17 billion from violating Article 6(1) GDPR, even if the Irish DPC issues a 4% fine**

Given that SAs can only fine based on the revenue of the last year, and the Irish DPC has taken more than 4.5 years to issue a final decision, Meta has made substantial revenue from violating the law, even if the maximum fine of 4% of the annual turnover is applied.

The estimated revenue from advertisements in the EEA of € 72,53 billion, would only be reduced to € 68,17 billion if the full 4% would be applied.

This clearly makes even a maximum fine of 4% not even remotely “*effective, proportionate and dissuasive*” in comparison to the unlawful revenue made by Meta IE.

Nevertheless the EDPB and the DPC are bound by Articles 83(1), (2)(k) and (5) GDPR at the same time, meaning that the maximum fine of 4% may not be overstepped, but must also be used fully to comply with the conflicting requirements of the GDPR.

- **Request for the EDPB to take immanent action against the Irish DPC**

Given the clear evidence that Meta IE has profited from the violation of Article 6(1) GDPR in vast excess of the maximum fine of 4% under Article 83(5) GDPR and the Irish DPC’s clear breach of the binding decision in this respect, we urge the EDPB and its members to take immediate action against the Irish DPC to ensure that the EDPB decision is fully implemented in Ireland.

We hope the information above is useful for the EDPB and its members. *noyb* is more than happy to assist the EDPB in this respect and is available at your disposal, should you require any additional information or evidence.

Kind Regards,



Max Schrems
Honorary Chairman of *noyb*