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For the attention of the CNIL complaints department,

Signed in Vienna, on 12 December
2024

noyb Case-No.:

C-091

Complainant :



(hereinafter: "the Complainant")

Represented pursuant to Article 80(1)
of the RGPD by :

noyb - European Centre for Digital Rights
Goldschlagstraße 172/4/3/2
1140 Vienna
Austria

Defendresse :

BeReal SAS
30/32 Boulevard Sébastopol
75004 Paris, FRANCE

Concerning :

Infringement of Article 4(11) and Article 5,
(1)(a), Article 7(3) and (4), Article 6(1)(a), Article
17(1)(b) and Article 25 of the GDPR.

COMPLAINT

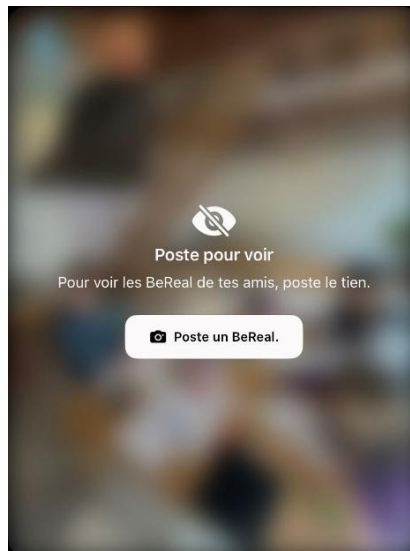
1. REPRESENTATION

1. *noyb* - European Centre for Digital Rights is a non-profit organisation active in the field of the protection of the rights and freedoms of data subjects, with registered office at Goldschlagstraße 172/4/2, 1140 Vienna, Austria, ZVR registration number: 1354838270 (hereinafter: "*noyb*") (**Annex 1**). *noyb* represents the Complainant pursuant to Article 80(1) of the GDPR (**Annex 2**).

2. FACTS OF THE CASE

2.1. New consent banner

2. BeReal is a social network that encourages users to share a photo with their followers every day. Every day, at a random time, users receive a notification inviting them to "BeReal". Once they have posted a photo, users can see what their friends have posted that day and react to the posts.
3. By April 2024, BeReal had more than 23 million daily active users.¹ Although the number of active users in Europe is not available, it is clear that the application is widely used. Since March 2023, more than 22 million people have downloaded the application in Germany, France, Italy and Spain.²
4. The primary function of the application is to post a daily BeReal. The default interface is an invitation to take the daily photo. The application only allows you to interact with your friends once the daily BeReal has been posted.



¹ <https://www.businessofapps.com/data/bereal-statistics/>. In particular, the number of active users who do not use the application on a daily basis could be much higher.

² <https://www.businessofapps.com/data/bereal-statistics/> (6.1 million in DE, 5.9 in FR, 5.8 in IT and 4.6 in ES).

Screenshot of the BeReal interface

5. Sometime in July 2024, BeReal began inviting users, via a consent banner, to allow BeReal to track their activities to deliver personalised experiences. The banner states that *"Your data will be used to provide you with a personalised experience"*.

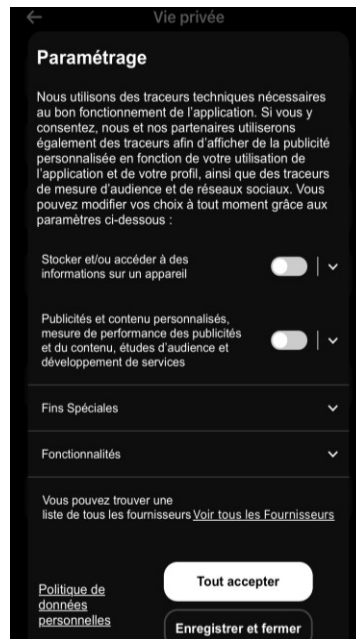


Screenshot of the BeReal consent banner

6. If a User selects *"Refuse"*, the consent banner disappears and the choice is memorised for the rest of the day. If a User selects *"Authorise"*, they are directed to the application's privacy settings.

2.2. In-depth monitoring

7. In BeReal's privacy settings, data subjects can see the tracking options available to them and manually choose to consent to some and refuse others. The personalisation settings note a number of different purposes, with two main categories.

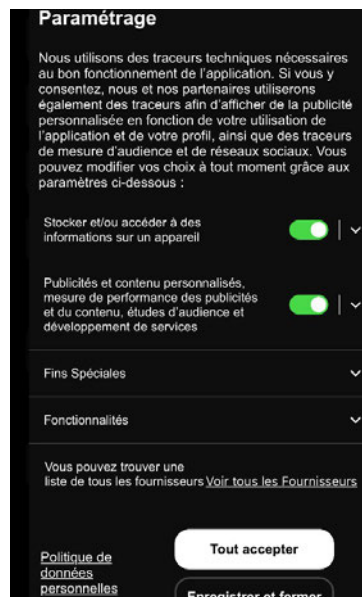


Screenshot of BeReal privacy settings

8. Firstly, data subjects may consent to *"Store and/or access information on a device"*.
9. Second, data subjects can consent to *"Personalised advertising and content, performance measurement of advertising and content, audience research and service development."* Checking this option allows users to authorise or reject all of the following types of advertising, which they can also authorise or reject on an individual basis:
 - Using limited data to select advertising ;
 - Create profiles for personalised advertising ;
 - Use profiles to select personalised ads ;
 - Create profiles to personalise content;
 - Measuring advertising performance;
 - Measuring content performance ;
 - Understand the audience using statistics or combinations of data from different sources;
 - Developing and improving services;
 - Use limited data to select content.
10. However, as we will see below, misleading models are used to encourage data subjects to "authorise" all processing (rather than withholding consent or "authorising" only part of the processing).

2.3. Misleading model: The choice NOT to authorise Tracking is not "memorised".

11. BeReal always remembers the choice to "authorise" all tracking. Once this option has been selected, users are no longer invited to interact with the consent banner.
12. However, if users make a choice other than to 'authorise' all treatments, they are prompted to interact with a consent banner every day, every time they try to take their daily 'BeReal'.
13. The Complainant is one of many users who, frustrated by the recurring appearance of the consent banner every time they tried to publish the daily BeReal, eventually stopped rejecting the banner and chose to "authorise" all treatments.



Screenshot of the complainant's privacy settings after selecting "Authorise" all treatments.

2.3.1. The "Do not authorise" choice is not memorised

14. Data subjects who select "*Do not authorise*" will continue to be invited to interact with the consent banner every day, every time they open their camera on BeReal to take their first photo of the day.

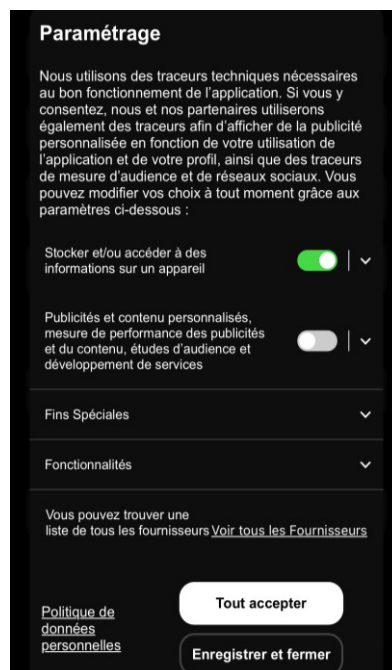
2.3.2. The choice to withdraw consent is not memorised

15. Data subjects who withdraw their consent after authorising processing are then reminded each day by a consent banner.
16. After "authorising" all the processing, the Complainant finally decided to manually adjust her settings and withdraw her consent.
17. Although she did not receive the consent banner when her settings were set to "authorise" all treatments, after withdrawing her consent to all the

treatment, the Complainant resumed receiving a consent banner every day, every time she opened her camera to take her daily BeReal.

2.3.3. The choice to authorise only certain Tracking options is not saved.

18. Data subjects who are presented with the consent banner and who select "Allow" and then choose to allow only certain tracking options will continue to see the consent banner displayed every day, every time they open their camera on BeReal to take their first photo of the day.
19. This situation also occurred for the Complainant. The Complainant first chose to "authorise" all the treatments, so that the consent banner was no longer displayed. She then changed her privacy settings to authorise only one of the tracking options.



Screenshot of the complainant's BeReal settings, authorising only one type of treatment.

20. However, after the Complainant manually adjusted her settings to allow only part of the tracking, the consent banner continued to appear every time she tried to take her daily BeReal.
21. When the Complainant subsequently selected "Do not authorise" on the consent banner, BeReal did not consider that her consent had been withdrawn and continued to track her according to the first setting, "*Store and/or access...*".
 - The user's choice is only saved if they choose to authorise all processing.
 - Choices to refuse consent, consent only to certain processing operations or withdraw consent are not 'remembered' and users must reject the cookie banner each time they use the application for their daily 'BeReal'.

In short, BeReal uses a deceptive model to induce consent by displaying an overly repeated pop-up to users who try to use the main function of the application, unless they accept all the treatments.

3. GROUNDS FOR COMPLAINT

3.1. Violations

22. BeReal's misleading model results in consent that is not freely given. Its processing on the basis of such inadequate consent lacks any legal basis and breaches the principles of fairness and transparency.
23. In particular, BeReal is in breach of Article 4(11), Article 5(1)(a), Article 7(3) and (4), Article 6(1)(a) and Article 25 of the GDPR.

3.2. Infringement of Article 5(1)(a) of the RGPD.

24. Requiring consent every time a user tries to take a photo on BeReal, unless they have 'authorised' all tracking, is a deceptive model. In other words, it is a deceptive interface that *"aims to influence users' behaviours, typically relying on cognitive biases, and may hinder their ability 'to effectively protect their personal data and make conscious choices', for example by rendering them unable 'to give informed and freely consent'"*³.
25. BeReal uses a type of deceptive "overload" model that requires users to perform repeated actions to withhold consent, which they would not need to do if they were "authorising" the processing. The EDPB describes this deceptive model as a continuous incentive:

The deceptive design pattern of continuous inducement occurs when users are induced to provide more personal data than is necessary for the purposes of the processing or to agree to another use of their data, by being repeatedly asked to provide additional data or to consent to a purpose of the processing. ⁴

26. The EDPB notes that, when they are repeatedly asked to give their consent to a processing purpose, *"users are likely to give in eventually, because they are tired of having to refuse the request every time they use the platform"*⁵.

³ EDPB 03/2022 guidelines on misleading design patterns in social media interfaces How to recognise and avoid them (2023), par. 3.

⁴ EDPB 03/2022 guidelines on misleading design patterns in social media interfaces How to recognise and avoid them (2023), par. 32.

⁵ EDPB 03/2022 guidelines on misleading design patterns in social media interfaces How to recognise and avoid them (2023), par. 32.

deliberation no. 2020-092 of 17 September 2020, para. 31, the CNIL similarly observed that when "*several actions are required to 'set up' a refusal to consent, [data controllers], in most cases, risk[nt] biasing the choice of the user, who wants to be able to view the site or use the application quickly.*" As is the case with cookie banners, which only allow tracking to be refused as a second layer, BeReal requires several actions on the part of the user to refuse consent.

27. BeReal's use of continuous prompting and overloading forces the user to give consent. This violates the principle of fairness established in Article 5(1)(a) GDPR.

3.3. No legal basis pursuant to Article 6(1)(a) of the RGPD.

28. BeReal requests the user's consent in order to track their data for personalisation purposes, basing its processing on Article 6(1)(a) of the GDPR.

29. According to Article 4(11) of the RGPD, consent must contain four elements to be valid: it must be a "*free, specific, informed and unambiguous expression of will*" on the part of the data subject.

30. The use of a "continuous prompting" model on data subjects who withhold consent each time they attempt to use BeReal's main feature - taking a daily BeReal - has a significant impact on user behaviour. Consent given in these circumstances is not "freely given" and therefore does not meet the requirements of the GDPR for valid consent.

31. Recital 32 of the GDPR requires consent requests to be "*clear, concise and not unnecessarily disruptive to the use of the service for which they are intended.*"

32. In CNIL deliberation no. 2020-092 of 17 September 2020, par. 37-38, the CNIL

"recommends that the choice expressed by users, whether consent or refusal, be recorded in such a way that they are not solicited again for a certain period of time".

The absence of conservation or "memory" of the User's choice "*could undermine his freedom of choice*". "This is why the CNIL has indicated that it is good practice to retain choices, for both consent and refusal, for a period of six months.⁶

33. Taking the daily "BeReal" photo is the primary function of the platform. Requiring users to opt out of processing every time they take their "BeReal" severely disrupts the intended use of the app and infringes the freedom of choice of data subjects, in breach of Article 7(4) of the GDPR.

⁶ CNIL deliberation no. 2020-092 of 17 September 2020, paras. 37-38.

34. Where the data subject is clearly induced to give consent rather than withhold it, the "consent" is not "*freely given*" as required by Articles 4(11) and 7(4) of the GDPR. Processing by BeReal on the basis of consent obtained in this way is therefore invalid and cannot be based on Article 6(1)(a) of the GDPR.

3.4. Infringement of Article 7(3) of the RGPD - Consent is more difficult to obtain to take away than to give.

35. Article 7(3) of the GDPR requires that "[*it should be*] as easy to withdraw consent as to give it. "

36. The EDPB's 03/2022 guidance on misleading design patterns in social media interfaces, para 30, notes that easy withdrawal of consent

"...Should be possible without lowering service levels...Consent cannot be considered valid under the GDPR where consent is obtained solely by a mouse click, swipe or keystroke, but opt-out requires more steps, is more difficult to achieve or takes longer."

37. To "authorise" the processing, BeReal users simply (1) select "Authorise" on the consent banner and (2) select "Authorise all processing" once they are directed to the privacy settings (see the description of this interface in section 2.2). Once they have authorised the processing, users are never asked to display the consent banner again.

38. Withdrawing consent is much more tedious. To withdraw her consent, the Complainant had to (1) "uncheck" the boxes granting consent to each type of processing for personalisation purposes and (2) reject the consent banner each day, each time she wished to post her daily "BeReal".

39. BeReal's deceptive "continuous prompting" model requires data subjects to repeatedly reject consent after withdrawing it (see section 2.3.2). There is no logical, technical or ethical reason to ask for consent again each time a user uses the application, unless they agree to any tracking.

40. By making it more difficult to withdraw consent than to grant it, BeReal is in breach of Article 7(3) of the GDPR.

3.5. Infringement of Article 17(1)(b) GDPR

41. Article 17(1)(b) RGPD obliges data controllers to erase users' data when they withdraw their consent to data processing. By pressuring the user to give consent, the data controller is, as described in section 3.4, in breach of Article 7(3) of the GDPR and as a result is also in breach of Article 17(1)(b).

3.6. Infringement of Article 25(1) GDPR

42. The EDPB has consistently emphasised that "*information and options for data processing should be provided in an objective and neutral manner, avoiding misleading or manipulative language or patterns.*"⁷ It notes that respect for data protection by design and data protection by default would avoid **t h e** use of misleading patterns from the outset.⁸
43. The design of the interface used by BeReal violates the fundamental idea of privacy by design in accordance with Article 25(1) of the GDPR.

⁷EDPB 03/2022 guidelines on misleading design patterns in social media interfaces How to recognise and avoid them (2023), para. 18 (citing EDPB 04/2019 guidelines on Article 25 Data Protection by Design and Default, p. 18, para. 70).

⁸EDPB 03/2022 guidelines on misleading design patterns in social media interfaces
How to recognise and avoid them (2023), par. 19.

4. APPLICATIONS

4.1. Enquiry pursuant to Article 58(1) of the RGPD.

44. In light of the above, the Complainant requests that CNIL fully investigate this complaint in accordance with its powers under Article 58(1) of the GDPR.

4.2. Corrective measures pursuant to Article 58(2) of the RGPD.

45. In view of the security flaws mentioned, the Complainant asks the CNIL to find that the Respondent

(a) has not obtained consent in accordance with Article 4(11) and Article 7(3) and (4) of the GDPR;

(b) Lack of legal basis for processing due to invalid consent under Article 6(1)(a) of the GDPR;

(c) breached Article 17(1)(b) GDPR;

(d) has not implemented data protection by design and by default in accordance with Article 25 of the RGPD.

46. The Complainant therefore urges the CNIL to exercise its power of correction and order the data controller to bring its processing operations into compliance with the GDPR in accordance with Article 58(2)(d) of the GDPR and to delete all relevant personal data as provided for in Article 58(2)(g) of the GDPR.

47. We would like to point out that the GDPR allows the CNIL to make an order that goes beyond the Complainant's personal data, as potentially millions of other EU data subjects are equally affected by the relevant processing activities. An order to largely erase all relevant data would ensure that BeReal and other third parties can no longer profit from unlawfully obtained personal data.

4.3. Suggestion to impose a fine

48. In light of the above infringements, the Complainant suggests that CNIL impose a fine under Article 58(2) of the GDPR. Factors to be taken into account include the seriousness of the breach, the potentially large number of data subjects affected by the infringing practice (Article 83(2)(a) of the GDPR), the measures (not) taken to remedy the aforementioned breaches (Article 83(2)(c) of the GDPR), and the use and sharing of tracking data for competitive and financial purposes (Article 83(k) of the GDPR).

5. CONTACT

49. Communications between the *noyb* and the CNIL in connection with this complaint may be made by e-mail, referring to the file number mentioned in the title of this complaint.

We are happy to provide further factual or legal details to address this claim. Please contact us at [REDACTED] or at [REDACTED]