Instagram, Facebook and WhatsApp at the EDPB

Alex Jameson, Senior Associate at Bird & Bird and avid reader of Supervisory Authority decisions, explores some developments involving Meta, the DPC and the EDPB

On 4th January 2023, Ireland's Data Protection Commission ('DPC') announced its final decisions in two inquiries into Facebook and Instagram, including €390 million in fines. On 19th January 2023, the DPC announced the third decision in the trilogy involving Meta companies, on WhatsApp, with an additional (modest) fine of €5.5 million. All three followed decisions issued by the European Data Protection Board ('EDPB') under the GDPR's Article 65 dispute resolution process, whereby the EDPB instructed the DPC to change certain aspects of its initial findings.

The decisions (all available via www.pdpjournals.com/docs/888336) contain significant, if for the most part unsurprising, analysis on the principle of fair, transparent and lawful processing in the context of personalised ads and service improvement and present big questions about the future of free, ad-funded online services.

The story so far

This issue can be traced back to day one of the GDPR — 25th May 2018 — when Meta's new terms of service ('ToS') prompted complaints which made their way to the DPC as Lead Supervisory Authority.

On GDPR day, Meta had given users of its Facebook, Instagram and WhatsApp services a choice: either accept the ToS and data policy, or delete their accounts. The ToS referred to certain processing activities, including personalised ads (for Facebook and Instagram) and service improvement and security purposes. The complainants alleged that this amounted to a 'forced consent' to such processing.

After three years of investigation, by October 2021 the DPC shared its draft decisions with other concerned EU Supervisory Authorities under the co-operation mechanism in Article 60 GDPR. The DPC had found significant failings on transparency, but accepted Meta's arguments that it was (a) not seeking to rely on consent as its legal basis for processing but instead on contractual necessity under Article 6(1)(b), and that (b) in the circumstances, it was entitled to rely on contractual necessity for this processing. The DPC proposed to fine Meta between €28 million and €36 million. Several concerned Supervisory Authorities raised objections, and so the case made its way through the GDPR's consistency and dispute resolution processes, resulting in the hexalogy comprising the EDPB's three decisions, directing the DPC's implementation of them in its final three decisions. The Facebook and Instagram decisions are broadly identical. The WhatsApp decision differs in that it does not cover transparency (this being the subject of an earlier, €225 million DPC fine in September 2021), and its focus is processing for service improvement and security purposes, and not personalised advertising.

Necessity means necessity

The DPC had found that, in the context of these ToSs, Meta could rely on contractual necessity as its legal basis. Importantly, the Facebook and Instagram models are free for users and funded by targeted and personalised ads, and the DPC saw this as essential to the bargain that was struck with users. In the context of WhatsApp, the DPC found that the processing undertaken for service improvement, and to maintain certain security and abuse standards, was likewise part of the substance and fundamental object of the contract.

The EDPB rejected this position and directed the DPC to change its findings in respect of both purposes. The EDPB's position on personalised ads is not particularly surprising: it is consistent with the position advanced in its guidelines on processing under Article 6(1)(b) in the context of online services (2/2019) — that such ads would generally not be necessary for the contract with the user. The EDPB emphasised that the test for contractual necessity required the processing in question to be objectively necessary for the performance of the contract, and that this may not be the case if there are realistic, less intrusive alternatives.

The EDPB suggested contextual advertising (i.e. advertising based on geography, language and content of the page visited by the user rather than on a profile of the data subject) as a possible alternative. The EDPB's finding that service improvement and security purposes were likewise not necessary for the contract, may have more expansive implica-

tions, given that these are common features of most online services, even those without ad-funded models.

Finally, whilst the DPC's draft decisions included a specific finding that the Meta companies were not required to rely on consent, the EDPB decided that there was not enough information for the DPC to conclude this. In particular, the EDPB was concerned that if special category data were being processed for the purposes in question, it would need to meet a condition under Article 9 of the GDPR, which may be consent. The EDPB found that the DPC had not investigated, and instructed the DPC to undertake further investigation on whether the Meta companies were processing special category data (and in the case of WhatsApp, whether personal data was also being processed for behavioural advertising purposes). In response, the DPC accused the EDPB of overreach, and said that it was not open to the EDPB to direct it to engage in an 'open-ended and speculative' investigation. The DPC has since instigated proceedings with the Court of Justice of the EU ('CJEU') for annulment of this part of the EDPB's decision.

Transparency requires granularity

The DPC had an easier ride from its fellow Supervisory Authorities on transparency; all were agreed with the DPC's finding that Meta had breached its transparency obligations in respect of the Facebook and Instagram processing. As noted, there was no such finding for WhatsApp since this had been addressed in an earlier decision.

The findings on transparency will be familiar to anybody who has read that earlier, 2021 WhatsApp decision (or attempted to update a privacy notice since). The DPC found that Article 13 GDPR requires controllers to provide information on processing in such a way as to ensure that there is a clear link between (a) the categories of personal data, (b) the purpose, and (c) the legal basis. In other words, an abstract list of processing purposes, followed by a section describing the legal bases a controller relies upon, is not sufficient. We are increasingly seeing the use of tables in privacy notices to meet this linking requirement, resulting in the privacy notice edging closer in form to a record of processing. The DPC also made several more straightforward points on the delivery of transparency information: the information needs to be clear and concise, not overgeneralised, and, if layered, easily navigable.

Linking back to legal basis, the EDPB observed that in this case the breach of Meta's transparency obligations was of such gravity that it clearly confused users into thinking they were being asked for their consent to the processing of their personal data. This is a good reminder that the common practice of 'click here to accept the privacy notice' is more consequential than just being poor practice.

Don't forget fairness

There were no separate infringements of the 'fairness' portion of Article 5(1)(a) included in the DPC's draft decisions, though fairness formed part of the DPC's analysis under transparency. Whilst the EDPB agreed with the DPC that transparency is connected to overall fairness, it also considered fairness to have independent meaning (i.e. the two are intrinsically linked but distinct requirements). Ultimately, the EDPB instructed the DPC to find a separate breach of the fairness principle.

The analysis here was interesting and suggests that the EDPB views fairness as a broad and useful tool to address what it considers to be generally unethical practices. It highlighted several elements of fairness, including data subject autonomy and expectations, power balance, deception, and ethical and truthful processing. In particular, the EDPB decisions draw attention to the importance of fairness in protecting data subjects against loss of control of their personal data of 'increasing economic value' in the digital environment.

What does this tell us about GDPR enforcement?

The decisions provide a detailed and insightful look into the GDPR's consistency and dispute resolution mechanisms in practice, and an interesting look into the apparent tension between big tech's primary regulator in the EU and, well, the rest of the EU.

There is lengthy discussion about the appropriate sanction and noting the wide range of enforcement tools, beyond fines, available to a Supervisory Authority — following the EDPB's directions, the DPC imposed revised corrective measures (to instruct Meta to change its legal basis within three months) and significantly increased the level of fine. The Netherlands Supervisory Authority even pushed for a ban on processing during the three-month remediation window, which was rejected by the EDPB for being excessive. And then there is the question of the EDPB's role and whether it did, as the DPC suggests, overreach its jurisdiction.

Final remarks

The Meta hexalogy underlines the limitations on the contractual necessity legal basis and pushes personalised advertising further into a corner. However, despite NOYB's pronouncement that this means opt-in consent is the only remaining option, these decisions do (just) leave open the possibility of relying on legitimate interests instead. It will be interesting to see whether this does signal a shift in advertising models to 'contextualisation' rather than 'personalisation', and if so, where the dividing line between the two should be placed (for example, how much processing before contextualisation becomes another form of profile-based advertising).

There is, of course, more to come, and we will wait to see the outcome of the DPC's clash with the EDPB as well as Meta's anticipated appeal.

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